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No. 03-

IN THE

Supreme Court of the United States

AMERICAN GEM SEAFOODS, INC. and
MCMI FOOD COMPANY, INC.,

Petitioners,

v.

WEI ZHANG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JANET HUGIE SMITH
FREDERICK R. THALER
RAY QUINNEY & NEBEKER
36 South State Street
Suite 1400
Salt Lake City, UT 84111
(801) 532-1500

WILLIAM A. NORRIS
REX S. HEINKE*
JONATHAN GOTTLIEB
AKIN GUMP STRAUSS HAUER
& FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

* *Counsel of Record*

Attorneys for Petitioners

184800

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Should the Court review the Ninth Circuit's affirmance of $2.6 million in punitive damages and $360,000 in compensatory damages where the Ninth Circuit failed to undertake "exacting" appellate review of the punitive damage award as required by *State Farm Mutual Automobile Insurance Company v. Campbell*, 123 S. Ct. 1513 (2003)

   (a) by not analyzing specific conduct of the corporate defendants in its reprehensibility analysis; and

   (b) by limiting its proportionality analysis to the observation that single digit multipliers generally are constitutional?

2. In cases seeking emotional distress damages under federal civil rights law (here 42 U.S.C. § 1981), is the Ninth Circuit correct that a plaintiff need not prove that his damages are "demonstrable, genuine, and adequately explained," in contrast with the law of six other circuits?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Harry Lees, a defendant and appellant below, is not a party to this Petition because the issues raised are specific to the corporate petitioners.

American Gem Seafoods Inc. is a wholly-owned subsidiary of MCMI Food Company, a privately held corporation.

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Petitioners MCMI Food Company and American Gem Seafoods, Inc. (collectively, "Petitioners") respectfully request that the Court grant *certiorari* to review the Ninth Circuit's punitive damages ruling.

In addition, Petitioners ask that this Court grant *certiorari* to review the Ninth Circuit's ruling on what evidence is necessary to prove emotional distress damages under federal civil rights law (here 42 U.S.C. § 1981).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a-48a) is published at 339 F.3d 1020 (9th Cir. 2003). The opinion of the United States District Court for the Western District of Washington denying MCMI's motion for Judgment as a Matter of Law and A New Trial (App. 49a-50a) is not reported.

STATEMENT OF JURISDICTION

The Court of Appeals issued its decision on August 7, 2003 and denied Petitioners' petition for rehearing or rehearing en banc on September 22, 2003. (App. 62a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Section 1981 of Title 42 of the United States Code provides that:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

This case concerns the propriety of the Ninth Circuit's approach to applying the punitive damages standards of *State Farm Mutual Automobile Insurance Company v. Campbell*, 123 S. Ct. 1513 (2003). It also concerns the propriety of the Ninth Circuit's minimal test for the award of emotional distress damages under federal civil rights law (here 42 U.S.C. § 1981), which conflicts with the law of six other circuits.[1] The Ninth Circuit affirmed $2.6 million in punitive damages and $360,000 in compensatory damages, including emotional distress damages of no less than $123,155.

Punitive Damages

The Ninth Circuit failed to conduct the reprehensibility or the proportionality analysis commanded by *Campbell*. Its reprehensibility discussion did not analyze the actual conduct of the corporate defendants. It contented itself with concluding that there was discrimination. It failed to discuss the limited evidence of this, the jury's rejection of the bulk of Plaintiff's discrimination case when it found Lees had not discriminated, and the undisputed facts that Zhang was fired when Petitioners confirmed he had lied to them about being

1. Section 1981 prohibits race discrimination in the making and enforcement of contracts. 42 U.S.C. §§ 1981(a), (b).

on vacation to hide a trip he took with their competitor and which their competitor paid for. The Ninth Circuit, thus, committed constitutional error by not considering the degree of reprehensibility of Petitioners' conduct[2].

In addition, the Ninth Circuit's proportionality discussion of the ratio between compensatory and punitive damages did not heed or even discuss *Campbell*'s admonition that when compensatory damages are "substantial," a one to one ratio between punitive and compensatory damages might approach the limits of due process. Nor did it discuss *Campbell*'s warning that high ratios between punitive and compensatory damages are unconstitutional when compensatory damages include a substantial amount for emotional distress as is true here. Based on its cursory conclusion that a single digit ratio between punitive and compensatory damages has not been rejected by this Court or the Ninth Circuit, the Ninth Circuit affirmed a greater than seven to one ratio.

Emotional Distress Damages

The Ninth Circuit's discussion of the emotional distress damages award acknowledged a circuit split over the standard for proving such damages under federal civil rights law (here in section 1981). In contrast with the law of six other circuits, the Ninth Circuit does not require that emotional distress damages be "demonstrable, genuine, and adequately explained." *Price v. City of Charlotte*, 93 F.3d 1241, 1251 (4th Cir. 1996). Accordingly, applying the least rigorous test of any Circuit, the Ninth Circuit allowed the emotional distress damage award to stand on the basis of Zhang's testimony alone.

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2. While Petitioners vigorously disagree, they realize they are bound by the ruling below that they did discriminate.

Relief Requested

Petitioners request that this Court grant *certiorari* to provide guidance on the proper reprehensibility and proportionality analysis.

In addition, Petitioners request that this Court grant *certiorari* to resolve the circuit split over the correct standard for proving emotional distress damages under federal civil rights law (here 42 U.S.C. § 1981).

I. Proceedings in the District Court.

In September 1999, following termination of his employment, Zhang filed suit in the Western District of Washington. Zhang, a Chinese national, sued for employment discrimination and retaliation in violation of 42 U.S.C. § 1981 and Washington law, R.C.W. 49.60.180. He sued his former employer, American Gem Seafoods, Inc. ("American Gem"), American Gem's corporate parent, MCMI Food Company ("MCMI"), and MCMI's President, Harry Lees.

At trial, Zhang's discrimination theory focused largely on the conduct of Harry Lees. The vast majority of testimony at trial of discriminatory animus concerned Lees, and the evidence of adverse employment decisions centered on decisions made by Lees. (ER226-33;242-43;258-62;270-71;284-87; S.ER48,63-64.) The jury instructions also emphasized Harry Lees' activity, instructing the jury that if the jury found Lees' conduct actionable, the corporate defendants were vicariously liable as a matter of law. (S.ER367.) Indeed, Lees was the only individual defendant.

The defendants presented substantial testimony at trial that Zhang's performance was unsatisfactory and that management's decision to terminate him had nothing to do with his race and national origin. Witnesses testified that Zhang failed to follow financial controls and sales practices that new management instituted. (ER222,331.) While employed by American Gem, Zhang also took a trip to Iceland with two former employees of American Gem. That trip, paid for by one of American Gem's competitors, was to cultivate business opportunities in Iceland. (ER100,106,214-17; S.ER97-97a.) Zhang told American Gem management that he was taking a family vacation to Las Vegas and California. (ER180,304,333.) Zhang admitted at trial that he lied. (ER304.)

Zhang sought both economic (*i.e.*, back pay and front pay) and emotional distress damages. (S.ER298,304,383-84.) In support of his emotional distress damages, Zhang offered only his own testimony. (ER233-34.) He explained that he was hurt and humiliated by the adverse employment actions. He offered no expert testimony nor any testimony from a health professional substantiating the extent of his emotional harm or attesting to its cause.

The jury concluded that Lees had not discriminated against Zhang under any theory of liability. (ER97-100; App. 53a-56a.) The jury also rejected Zhang's retaliation, hostile work environment, and state law discrimination claims. (ER97-100; App. 53a-56a.) Despite its finding that Lees was not liable under section 1981, however, the jury found the corporate defendants liable under that statute. (ER98; App. 54a.) It awarded Zhang $360,000 in compensatory damages, of which at least $123,155 was for emotional harm, and $2.6 million in punitive damages. (ER 97-103.)

Following the verdict, the defendants moved for judgment as a matter of law under Federal Rule of Civil Procedure 50, and for a new trial and/or remittitur under Federal Rule of Civil Procedure 59. Among other issues, the defendants argued that the evidence did not support an award of emotional distress damages, that the corporate defendants could not be held liable without Lees' liability, and that the punitive damage award was excessive. The district court denied defendants' motions in all respects (App. 49a-50a.) and entered judgment on the verdict. (App. 51a-52a.)

Defendants appealed to the United States Court of Appeals for the Ninth Circuit.

II. Proceedings in the Ninth Circuit.

In a published opinion, the Ninth Circuit Court of Appeals affirmed the judgment. *Zhang v. American Gem*, 339 F.3d 1020 (9th Cir. 2003).

Referring to the standards this Court set forth in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003) (which was decided just before oral argument in the Ninth Circuit), the Ninth Circuit ruled the punitive damages constitutionally permissible. Despite its recognition that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct," the Ninth Circuit's reprehensibility discussion constitutes only three paragraphs. Based on the history of discrimination in this country, the Ninth Circuit concluded that intentional discrimination of any sort is "highly reprehensible conduct." *Id.* at 1043-44 (App. 44a). The court did not discuss the limited evidence of discrimination, the jury's exoneration of

Lees and thus rejection of most of Plaintiff's discrimination evidence, and the undisputed facts that Zhang was fired as soon as Petitioners confirmed he went on a trip with a competitor and lied to cover that up. In short, the Ninth Circuit concluded that once there is discrimination it need consider nothing else in its reprehensibility analysis.

Turning to *Campbell*'s second step – the relationship between compensatory and punitive damages – the Ninth Circuit recognized that the ratio between the $2.6 million punitive award and the $360,000 compensatory damages award was "slightly more than seven to one." 339 F.3d at 1044 (App. 46a). It observed that seven to one is a single digit ratio. Further, it noted that the seven to one ratio is a lower than the ratios in *Campbell* and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), where this Court invalidated punitive damage awards. It stated that it was "aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages" and thus would not "extend the law in this case." 339 F.3d at 1044 (App. 46a). On the basis of those three observations, the Ninth Circuit concluded that "[t]he ratio here is not constitutionally excessive." *Id.*

Although it recognized that the compensatory damages award contained a "substantial" emotional distress component, *id.* at 1041 (App. 39a), the Ninth Circuit did not discuss *Campbell*'s admonition that "substantial" compensatory damages, particularly those containing a substantial emotional distress component, will warrant a "lesser ratio, perhaps only equal to compensatory damages." *Campbell*, 123 S. Ct. at 1524. Nor did it discuss *Campbell*'s instruction that a four to one ratio "might be close to the line of constitutional impropriety." *Id.* at 1524 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991)).

The Ninth Circuit further ruled that the third *Gore* guidepost – the comparison to civil or criminal penalties applicable to comparable misconduct – did not warrant reduction of the verdict. It noted Congress' imposition of a recovery cap of $300,000 under the comparable provisions of Title VII, but downplayed its importance because "Congress has not seen fit to impose any recovery caps in cases under § 1981." 339 F.3d at 1045 (*quoting Swinton v. Potomac Corp.*, 270 F.3d 794, 820 (9th Cir. 2001)) (App. 47a). In any event, the court reasoned that even though a single guidepost indicates a punitive damage award is excessive, that does not undermine the award as a whole. *Id.* (App. 47a-48a).

Reviewing the jury's emotional distress damages award for sufficiency of the evidence, the Ninth Circuit acknowledged that its precedent allows a lower threshold of proof than other circuits. Despite its recognition that the Fourth Circuit required "objective evidence" to justify a substantial award of emotional distress damages, the Ninth Circuit held Zhang's testimony alone to be "more than sufficient to support a substantial compensatory damage award for emotional distress." *Id.* at 1041 (App. 39a). The Ninth Circuit did not note the more rigorous standards of proof applied by five other circuits in addition to the Fourth Circuit.

Petitioners sought rehearing and rehearing en banc, both of which were denied in an Order of September 22, 2003. (App. 61a-62a.) Petitioners subsequently sought a stay of the Ninth Circuit's mandate to allow them to seek review in this Court, which the Ninth Circuit granted on October 16, 2003.

REASONS FOR GRANTING THE PETITION

I. By Failing To Conduct A Meaningful Reprehensibility Analysis And By Concluding That A Single-Digit Ratio Is *Per Se* Constitutional Even In Cases Where There Is A Substantial Emotional Distress Award, The Ninth Circuit Failed To Faithfully Apply *Campbell*, Warranting *Certiorari*.

Although the Ninth Circuit mentioned *Campbell*'s standards, it failed to apply the ones mentioned in any meaningful way and did not even discuss the other applicable *Campbell* standards. Therefore, the Ninth Circuit's decision should be summarily reversed. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510 (2001) (summarily reversing lower court opinion for its facially accurate recitation but erroneous application of this Court's precedents).

In a series of cases – *Haslip*, *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001); and *Campbell* – this Court has increasingly encouraged courts to scrutinize punitive damage awards. *Campbell* is the culmination of that trend. In *Campbell*, this Court emphasized that courts must carefully scrutinize punitive damage awards and gave courts standards to use to do that.

The Ninth Circuit essentially ignored *Campbell*'s teachings by not even discussing most of *Campbell*'s standards and only cursorily discussing those few *Campbell* standards it cited. This is not the "exacting" scrutiny that this Court has commanded. If the Ninth Circuit's approach to *Campbell* is

allowed to stand, *Campbell* will become a nullity. Review is essential to ensure that lower courts understand that this Court's teachings in *Campbell* must be implemented.

A. The Ninth Circuit Failed To Follow Campbell's Command That Punitive Damage Awards Must Be Calibrated To The Reprehensibility Of The Defendant's Conduct.

As the Ninth Circuit recognized, "'the most important indicium of reasonableness . . . is the degree of reprehensibility of the defendant's conduct.'" *Campbell*, 123 S. Ct. at 1521 (*quoting Gore*, 517 U.S. at 575). Nevertheless, it never conducted a meaningful reprehensibility review.

Campbell directs courts to assess the degree of reprehensibility by assessing whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; (5) and the harm was the result of intentional malice, trickery, deceit, or mere accident. 123 S. Ct. at 1521. These factors do not appear in the Ninth Circuit's opinion.

In lieu of a detailed discussion of reprehensibility, the Ninth Circuit compared the discriminatory conduct here to the fraudulent business practices in *BMW*, *Cooper Industries*, and *Campbell*. It concluded that "intentional discrimination is a different kind of harm, a serious affront to personal liberty." 339 F.3d at 1043 (App. 44a). Referring to this country's regrettable history of racial discrimination, the international consensus that such discrimination is wrong,

and the observation that "racial discrimination often results in large punitive damage awards," the court "ha[d] no trouble concluding that the corporate defendants' discrimination against Zhang was sufficiently reprehensible" to support the punitive damage award. *Id.* at 1045 (App. 45a).

Under the Ninth Circuit's rule, no assessment of specific conduct is required in a case where the plaintiff establishes liability for racial discrimination. The problems with the Ninth Circuit's approach resemble those posed by a statute struck down by this Court in *Honda Motor Company v. Oberg*, 512 U.S. 415 (1994). In *Oberg*, an Oregon statute provided that if there was *some* evidence to support a punitive award, no further judicial review was permitted. *Id.* at 429. This Court invalidated the Oregon law because it provided no means to evaluate the size of a punitive award, thereby abridging defendants' rights to meaningful due process review. *Id.* That defect appears here as well: the determination of a plaintiff's entitlement to punitive damages does not establish that the *amount* of the award is constitutional. *Id.*

In *Cooper*, this Court held that "'the level of punitive damages is not really a 'fact' 'tried' by the jury.'" 532 U.S. at 437 (*quoting Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 549 (1996) (Scalia, J., dissenting)). Accordingly, "appellate review of the district court's determination that an award is consistent with due process does not implicate . . . Seventh Amendment concerns." *Id.* Thus, the *proper amount* of punitive damages is a "constitutional fact," requiring the most exacting degree of judicial scrutiny. *E.g.*, Henry P. Monaghan, *Constitutional Fact Review*, Colum. L. Rev. 229, 230-31 (1985). Just as in First Amendment law, an appellate court must undertake an "independent review" of the record to ensure that there is no "forbidden

intrusion" on constitutional rights (*Bose Corp. v. Consumers Union*, 466 U.S. 485, 508 (1996)), such an independent review is necessary here. Yet, no such independent review was conducted.

While a reviewing court must accept the jury's verdict of liability for the corporate defendants, it follows that the court must also accept the jury's exoneration of Lees, the only individual defendant and the person whom Zhang contended engaged in most of the allegedly discriminatory acts. When the undisputed evidence of Zhang's lying about his trip with Petitioners' competitor is also weighed, the reprehensibility of Petitioners' conduct is limited and certainly not egregious enough to justify the amount of punitive damages here: greater than seven times compensatory damages.

The Ninth Circuit erred in failing to conduct a meaningful reprehensibility analysis because it did not conduct such an independent review. If its approach is allowed to stand, it will eviscerate *Campbell*. Review on this issue is, therefore, warranted.

B. The Ninth's Circuit Holding That Single-Digit Ratios Are *Per Se* Constitutional Regardless Of The "Substantial" Nature Of The Compensatory Damages Awarded Ignores *Campbell*'s Teachings.

The Ninth Circuit upheld the greater than seven to one ratio ($2.6 million punitive to $360,000 compensatory damages) in this case. It observed that a seven to one ratio was less than nine to one, citing *Campbell*. 123 S. Ct. at 1524 ("Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards

exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."). Observing that the ratios in *Campbell*, *BMW*, and *Cooper* were significantly higher than the seven to one before it, the Ninth Circuit affirmed. 339 F.3d at 1044 (App. 46a).

The Ninth Circuit completely ignored *Campbell*'s admonition that four to one "might be close to the line of constitutional impropriety." *Campbell*, 123 S. Ct. at 1524 (citing *Haslip*, 499 U.S. at 23-24). It also failed to heed *Campbell*'s instruction that in cases with "substantial" compensatory damages, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limits of the due process guarantee." *Id.* Nor did it acknowledge in its proportionality discussion that the compensatory damages included emotional distress damages of no less than $123,155. Thus, it also ignored *Campbell*'s warning against punishing defendants more than once for the same conduct by awarding overlapping emotional distress and punitive damages. *Id.* at 1525.

The Ninth Circuit also commented that it was unaware of any cases from this Court or the Ninth Circuit invalidating a single digit ratio between punitive and compensatory damages. 339 F.3d at 1044 (App. 46a). This implies there is some well-established history the court was relying on. In fact, only four months elapsed between *Campbell* and the decision below, so it is hardly surprising there were no such cases. The Ninth Circuit's observation just confirms its unwillingness to engage in the rigorous analysis that *Campbell* requires.

Other circuit courts have similarly failed to conduct rigorous proportionality review. *Bogle v. McClure*, 332 F.3d 1347, 1360 (11th Cir. 2003) (affirming approximately $13.5 million punitive damages award to individual plaintiffs on approximately $3.5 million compensatory damages award, including $500,000 for emotional distress, for nearly 4:1 ratio, in racial discrimination case), *petition for writ of certiorari filed* October 23, 2003. District courts have also failed to conduct rigorous proportionality reviews.[3] Thus, the problem is not limited to the Ninth Circuit.

Because the Ninth Circuit failed to comply with *Campbell*'s dictates as to a reprehensibility review and a proportionality review, Petitioners request that the Court grant *certiorari* to provide guidance on the issues of reprehensibility and proportionality raised here.

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3. *Southern Union Co. v. Southwest Gas Corp.*, No. CV991294-PHXROS, 2003 WL 22111144 (D. Ariz. Aug. 1, 2003) (in § 1983 case, entering judgment on jury award of $60 million in punitive damages on $390,072.58 in compensatory damages, for ratio greater than 153:1); *McClain v. Metabolife International, Inc.*, 259 F. Supp. 2d 1225, 1235 (N.D. Ala. 2003) (ordering remittitur of one plaintiff's award of punitive damages from $1,000,000 to $450,000 on $50,000 compensatory damages but upholding ratios of 25:1, 20:1, 9:1, and 7.5:1).

II. The Ninth Circuit Deepened A Circuit Split By Holding That Proof Of Emotional Distress Damages Under Federal Civil Rights Law (Here 42 U.S.C. § 1981) Need Not Be "Demonstrable, Genuine, And Adequately Explained."

In its assessment of the sufficiency of evidence to support the jury's compensatory damage award, which included a substantial emotional distress component, the Ninth Circuit acknowledged a conflict between its rule and that of the Fourth Circuit regarding the relevant standard. *Zhang*, 339 F.3d at 1040. (App. 37a). Unlike the Fourth Circuit, the Ninth Circuit does not require that emotional distress damages be "'demonstrable, genuine, and adequately explained.'" *Id.* (*quoting Price v. City of Charlotte*, 93 F.3d 1241, 1251 (4th Cir. 1996)) (App. 37a). Accordingly, Zhang's testimony that he was "greatly hurt and humiliated by his termination and the manner in which it was carried out," by itself, was sufficient to support an emotional distress award of not less than $123,155. *Id.* at 1041. (App. 38a).

Although the Ninth Circuit acknowledged this circuit split, it did not acknowledge its depth. The Second, Third, Fourth, Fifth, Seventh, and Tenth Circuits all require more than the conclusory testimony of the aggrieved party to sustain a compensatory damage award for emotional distress under federal civil rights law. *See, e.g.*, *Miner v. City of Glens Falls*, 999 F.2d 655, 662-63 (2d Cir. 1993) (requiring demonstrable emotional distress in § 1983 action rather than conclusory testimony); *Spence v. Board of Education*, 806 F.2d 1198, 1201 (3d Cir. 1986) (concluding, in § 1983 action, that an emotional distress claim could not be established where the evidence consisted "chiefly of plaintiff's own testimony" and did not establish that she suffered physically,

that she sought psychiatric counseling, that her peers held her in any less esteem, or that she suffered a loss of income); *Price*, 93 F.3d at 1254 ("substantial evidence" is required to support a compensatory damage award for emotional distress in § 1983 case); *Brady v. Fort Bend County*, 145 F.3d 691, 718-19 (5th Cir. 1998) (holding in § 1983 action that because "[c]onclusory statements give the finder of fact no adequate basis from which to gauge the 'nature and circumstances of the wrong and its effect on the plaintiff' [cite], . . . a plaintiff must present evidence of 'demonstrable emotional distress which must be sufficiently articulated'") (*quoting Price*, 93 F.3d at 1254)); *Biggs v. Village of Dupo*, 892 F.2d 1298, 1304 (7th Cir. 1990) (requiring plaintiff in § 1983 action to "reasonably and sufficiently explain the circumstances of his injury and not resort to mere conclusory statements") (internal quotation omitted); *Morgan v. Secretary of Housing and Urban Development*, 985 F.2d 1451, 1459 (10th Cir. 1993) (requiring "substantial evidence" rather than "mere assertions of emotional distress" in Fair Housing Act case, Civil Rights Act of 1968, § 804).

By contrast, only the Eleventh Circuit joins the Ninth in ruling that a plaintiff's conclusory testimony by itself is sufficient to support emotional distress damages. *Bogle*, 332 F.3d at 1359 (in § 1983 claim, denying sufficiency challenge to emotional distress damages where plaintiffs presented no evidence of emotional distress other than their own testimony). In *Bogle*, white librarians sued managers of the state library system after they were demoted because of their race. At trial, the librarians testified to their own emotional distress caused by the discrimination, but presented no testimony from third parties, such as medical professionals. *Id.* The jury awarded $1 million in emotional distress damages to each plaintiff, which the trial court

remitted to $500,000 each. On appeal, the Eleventh Circuit held that "a plaintiff's own testimony of embarrassment and humiliation can be sufficient to support an award for compensatory damages," and then deferred to the district court's determination regarding the proper amount of damages. *Id.*

As indicated by the number of circuit court cases addressing this question and the deep split between them, litigation over the proper test for emotional distress damages is common. Moreover, *Bogle* and this case were decided two months apart, indicating that this issue is very current. The importance and urgency of this issue warrants review.

The proper test for emotional distress damages has also grown in importance since this Court decided *Campbell* because *Campbell* recognizes that emotional distress damages present risks of duplicative and unconstitutional punishment. Protection of defendants' due process rights requires application of the proper test for emotional distress damages.

The Ninth and Eleventh Circuits stand alone on one side of this lopsided circuit split. The test they apply makes it easy to fabricate emotional distress claims. *Certiorari* is warranted to determine whether emotional distress damages in federal claims can be sustained solely on the basis of conclusory statements made by an allegedly injured plaintiff.

CONCLUSION

For the foregoing reasons, Petitioners MCMI Food Company and American Gem Seafoods, Inc. respectfully request that the Court grant *certiorari* and then summarily vacate the Ninth Circuit's ruling affirming the punitive damage award and remand for consideration of the factors set forth in *Campbell*. Alternatively, Petitioners request that the Court grant *certiorari* to review the Ninth Circuit's punitive damages ruling. In addition, Petitioners ask that this Court grant *certiorari* to review the Ninth Circuit's ruling on what evidence is necessary to prove emotional distress damages under federal civil rights law (here 42 U.S.C. § 1981).

Respectfully submitted,

JANET HUGIE SMITH
FREDERICK R. THALER
RAY QUINNEY & NEBEKER
36 South State Street
Suite 1400
Salt Lake City, UT 84111
(801) 532-1500

WILLIAM A. NORRIS
REX S. HEINKE*
JONATHAN GOTTLIEB
AKIN GUMP STRAUSS HAUER
& FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

* *Counsel of Record*

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 7, 2003

United States Court of Appeals,
Ninth Circuit.

No. 01-36130.

Wei ZHANG,

Plaintiff-Appellee,

v.

AMERICAN GEM SEAFOODS, INC., Delaware corporation; MCMI Food Company, a Texas corporation; Harry Lees, a natural person,

Defendants-Appellants.

Argued and Submitted April 10, 2003.

Filed Aug. 7, 2003.

Before: D.W. NELSON, THOMAS, Circuit Judges, and PREGERSON,* District Judge.

D.W. NELSON, Senior Circuit Judge.

Appellee Zhang Wei ("Zhang")[1] asserted claims for employment discrimination and breach of contract,

* The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

1. Zhang's name is found in the record as both Zhang Wei, according to the Chinese practice of placing the surname before the given name, and Wei Zhang.

contending that he was retaliated against and ultimately fired due to his Chinese ethnicity and nationality. He sued his former employer, appellant American Gem Seafoods, Inc. ("American Gem"), American Gem's corporate parent, appellant MCMI Food Company ("MCMI" and, together with American Gem, the "corporate defendants"), and MCMI's president, appellant Harry Lees, in federal district court. A jury found the corporate defendants liable for discrimination under federal law, awarding both compensatory and punitive damages, and found the corporate defendants and Lees liable for breach of contract, awarding lost wages and wages willfully withheld. All of the defendants appealed. We affirm the district court's entry of judgment on the jury's verdict.

FACTUAL BACKGROUND

The factual recitation herein is taken from the evidence presented to the jury.

Zhang Wei, formerly a professor of business and a proponent of Western economic systems at Northeastern University in Dalian, China, came to the United States in 1990 due to the political crackdown following the Tiananmen Square massacre. After finishing his MBA at Delaware State University, he began working in the seafood industry, eventually becoming the vice president of SeaRich Seafoods and general manager of SeaRich West, based near Seattle.

In September 1997, MCMI formed American Gem as a subsidiary to take over SeaRich Seafoods and several other seafood companies. Zhang was hired to join American Gem after the takeover; according to his employment contract,

which was signed by Al Reitzer, then president of American Gem, Zhang's position was vice president of American Gem and general manager of its Pacific Gem division. Zhang testified that although his division was integral to the new company's operations, he was initially offered a lower salary than the Caucasian vice presidents of the acquired companies. He held out for equal compensation, and eventually American Gem agreed. In October 1998, Zhang was promoted to president of the Pacific Gem division, and a 1998 American Gem publication listed Zhang as "responsible for all seafood procurement from China and other Asian countries."

In December 1997, appellant Harry Lees was hired as president and CEO of MCMI. Lees took a direct role in the management of American Gem, superseding Reitzer; Lees asked Reitzer to step aside as president of American Gem, and Reitzer appointed James Mullin as president in the spring of 1998. In November 1998 Lees hired a new management team that included Clair Parker and Jim Bugbee. Mullin left American Gem shortly thereafter and Lees forced Reitzer to resign in December 1998. Parker then became president of American Gem, and Bugbee became a vice president. Also around this time, Jim Hilger was hired as the Chief Financial Officer of American Gem.

Zhang presented evidence that he was discriminated against by American Gem's management, especially the new management team. Witnesses testified that Lees told them that he distrusted Zhang because he was Chinese, that Lees did not like Chinese people and made derogatory comments about them, and that Lees suspected that Zhang was "looking out for his Chinese friends' interests at the expense of our

company." Another Chinese employee, Parker Gao, testified that Zhang was generally treated worse than American Gem's white employees.

Zhang was sidelined in the management of American Gem. Although Zhang was a vice president and had previously reported directly to the American Gem president, he was now required to report to the new management team, including CFO Hilger and fellow vice president Bugbee, and he was excluded from management meetings. He had previously been in charge of all Asian operations, but his new business card listed him as Vice President, China Operations. This new description apparently reflected a demotion. No one told him why.

Industry publications, which apparently got their information from American Gem, also omitted Zhang's name from lists of managers. One referred to six managers in American Gem's "new Seattle-based management team," including Parker, Bugbee, and Hilger, but not Zhang. Another publication, dated February 1, 1999, omitted Zhang from a list of officers, vice presidents, and managers of American Gem—a list that showed Bugbee as the Vice President for Asian Procurement—and stated that American Gem's "management has been completely replaced." Zhang testified that many of his suppliers were confused by this and called him to see whether he was still with the company.

Zhang presented evidence that he worked hard and that he brought in profits for American Gem. In addition to the Pacific Gem division, Zhang worked with an office in Dalian, China, Zhang's hometown. Zhang often worked from 6:30

a.m. until midnight to stay in contact with operations both on the East Coast and in China. Reitzer, Zhang's former supervisor, testified that Zhang was a dedicated and tireless worker.

Zhang's division, Pacific Gem, was the only profitable division in the company, and Zhang had the highest sales of any American Gem employee in 1998. Although he was entitled to a $25,000 bonus under his contract, he was never paid one for 1998. Lees testified that Zhang did not receive a bonus because although the Pacific Gem division was profitable, American Gem as a whole was not. Nonetheless, after Zhang was terminated, Bugbee, who is Caucasian, received a bonus for 1999 even though American Gem was unprofitable that year. Zhang also testified that the Dalian office's expenses were not paid by American Gem while he was in charge.

Zhang never received any antidiscrimination policy literature or training while he worked at American Gem and was not informed about how to make a discrimination complaint. Mullin, American Gem's president during 1998, testified that there was "no real [antidiscrimination] policy" during the time that American Gem was formed.

In February 1999, Zhang took a trip to Iceland along with two former American Gem employees. They met with people at Atlantic Coast Fisheries, and Zhang handed out his Pacific Gem business card. Zhang told the company that he was taking a personal vacation with his father—his first vacation since starting work at SeaRich Seafoods—and used his vacation time for the trip. Upon his return from Iceland

on February 24, 1999, he was met by Parker and Hilger as he exited Customs at Boston's Logan Airport, and they told him in a loud voice that he was terminated. When he asked why, they told him that he could go back to Seattle to find out. No one asked him why he had gone to Iceland. Cynthia Diaz, an attorney who worked for MCMI's parent company, told Zhang that he was fired for going to Iceland with competitors. At trial, however, Lees testified that, at the time Zhang was terminated, no one knew why he had made the trip. Several months after he was terminated, and after repeatedly requesting an explanation, Zhang received a letter from Diaz stating that in addition to the Iceland trip, he was terminated because he violated a directive against extending credit, refused to provide documentation of transactions in China, and was insubordinate to Lees. None of these accusations was substantiated at trial.

Zhang also presented evidence that, in comparison to Caucasian employees who had been terminated, he was treated unfavorably during and after his termination. He was terminated publicly without any chance to respond to any allegations of wrongdoing and without so much as a word of explanation. His company car was immediately confiscated, and his personal effects were held by American Gem. After termination, he did not receive any salary, expense reimbursements, accrued vacation time, or medical benefits. Finally, American Gem sent letters, written in English and Chinese, to his suppliers in China stating that he no longer worked for them.

In contrast, other former employees of American Gem, all Caucasian, had not been fired immediately or publicly

and in most cases had been allowed to resign. They had been given severance packages and had continued to receive salary and benefits after termination. One employee who had a company car was allowed to keep it for six weeks after termination. Some of these employees were terminated for cause, including two who were basically stealing from the company and one who allegedly exposed himself to his coworkers. None said that American Gem sent out letters to their business contacts notifying them of the termination.

When Zhang was fired, Bugbee came to the company's Seattle office and confiscated the keys of American Gem employees Parker Gao and Stacy Li, who are Chinese. Bugbee then assumed Zhang's former title and responsibilities as Vice President for Asian Procurement, although he was not able to get the same favorable terms in China that Zhang had gotten. And, as noted above, Bugbee received a bonus for his performance in 1999.

PROCEDURAL BACKGROUND

Zhang brought suit in federal district court in September 1999; jurisdiction was premised on allegations of employment discrimination in violation of 42 U.S.C. § 1981. Zhang also alleged discrimination in violation of the Washington Law Against Discrimination, Wash. Rev.Code ch. 49.60, breach of contract in violation of Washington law, and willful withholding of wages and benefits under Washington law.

The jury returned a mixed verdict for Zhang. Although it rejected his hostile work environment, retaliatory discharge,

and state-law discrimination claims, it found that the corporate defendants—but not Lees—were liable for federal-law discrimination under § 1981 and that all defendants were liable for breaching Zhang's employment contract. On the § 1981 claim, the jury awarded $360,000 in compensatory damages and $2,600,000 in punitive damages. On the breach of contract claim, the jury awarded $86,000 in lost wages. Because Washington law allows double damages for willful withholding of wages, *see* Wash. Rev.Code §§ 49.52.050(2), 49.52.070, the jury was also asked how much of Zhang's wages were willfully withheld; the jury answered with the figure $87,500.

Immediately recognizing that the jury's verdict was apparently inconsistent because it had awarded more in double damages than in base damages, the trial court ordered briefing on what should be done. In response, the defendants argued not only that this discrepancy created an inconsistency requiring vacation of the jury's verdict, but also that the jury's split verdict—finding liability for the corporate defendants but exonerating Lees—was inconsistent. The court characterized the defendants' brief as a motion for new trial and allowed Zhang to respond. The court then orally denied the motion. As to the discrepancy in lost wages, the court reasoned that, at most, the defendants would only be entitled to a new trial on damages for that issue, but that any error was cured by Zhang's stipulation to remittitur of the $87,500 figure to $86,000. As to the split liability finding, the court found that there was substantial evidence in the record that persons other than Lees took adverse actions against Zhang, including firing him.

The defendants then filed another motion for new trial and judgment as a matter of law (JMOL).[2] The defendants renewed their argument that the evidence did not support the corporate defendants' liability without Lees's liability, and also argued that Lees could not be held personally liable for breach of contract, that there was no evidence to justify instructing the jury on punitive damages, that the evidence did not support the compensatory damage award, and that the punitive damage award was excessive. The district court denied the motion, and the defendants appealed, raising mostly the same issues that were the subject of the post-trial motions as well as evidentiary and instructional issues.

DISCUSSION

I. The district court's exclusion of the purported antidiscrimination policy

The only evidentiary ruling challenged by the appellants is the trial court's exclusion of an antidiscrimination policy that was purportedly applicable to American Gem. We review the decision to exclude evidence for abuse of discretion, *see Tremain v. Bell Indus., Inc.*, 196 F.3d 970, 976 (9th Cir.1999), and we find none here.

The purported antidiscrimination policy is part of a document entitled "Quick Reference Guide on Policies/

2. Historically, a motion for JMOL submitted at the close of all the evidence has been known as a motion for a "directed verdict," and a motion for JMOL submitted after the jury's verdict is returned has been known as a motion for "judgment notwithstanding the verdict" (JNOV, after the Latin *non obstante veredicto*). *See* Fed.R.Civ.P. 50 advisory committee's note.

Procedures for Mission City Management, Inc." The specific policy is found under the heading "Sexual Discrimination/ Harassment" and makes one reference to race: "Mission City Management, Inc. prohibits harassment based on race, color, religion, sex national origin [sic], age, disability or veteran status." The defendants attempted to admit the document during Lees's trial testimony to demonstrate that the corporate defendants had an antidiscrimination policy.

The district court excluded the document for several reasons. Because Mission City Management, Inc., although related to MCMI Food Company, is a separate company and was not a defendant,[3] the district court initially held that there was no foundation establishing that the document was the policy of the corporate defendants. After Lees testified that he had established this policy as the policy of MCMI, the court excluded the document because it was undated and unsigned, it was not produced in discovery, and there was no evidence that it had been "seen by anyone at Pacific Gem."

The district court did not abuse its discretion in excluding the document as a discovery sanction. The appellants concede that the policy was not produced to Zhang until after the discovery cut-off date and after Lees's deposition. The only basis for nondisclosure given by counsel at trial was that "there was a rash of discovery when we were involved in the case," and no additional reasons have been given in the briefing before this Court. This does not constitute a

3. The record reflects that Mission City Management, Inc., was originally named as a defendant, but the district court later allowed substitution of MCMI Food Company as the proper defendant pursuant to Federal Rule of Civil Procedure 15(c)(3).

"substantial justification" for not disclosing this document, and in the absence of such a justification the district court may validly exclude, as a discovery sanction, evidence not produced in discovery. Fed.R.Civ.P. 37(c)(1).

Alternatively, the district court did not abuse its discretion in excluding the evidence for lack of foundation. In order for the document to be relevant to this case, see Fed.R.Evid. 401, the defendants would have had to establish that it actually reflected the policy of Pacific Gem, American Gem, or MCMI, and there was no competent evidence that it had in fact been distributed to the managers or employees of any of these entities. Although Lees testified that the policy had been distributed, he also testified that others performed the distribution, and there is no evidence that he had personal knowledge that employees received the policy. Furthermore, at trial, the defendants stipulated to the fact that American Gem never provided Zhang "with a company policy or handbook prohibiting discrimination or harassment." The district court's conclusion that Lees's testimony was insufficient to provide a foundation for this document was not an abuse of discretion.

II. Lees's personal liability for breach of contract

The jury found both Lees and the corporate defendants jointly and severally liable for breach of Zhang's employment contract, following instructions and a verdict form that expressly allowed such a result. The appellants argue that, contrary to the jury's verdict, Lees could not be held liable for breach of Zhang's employment contract because he was not a party to that contract. We hold that the appellants have waived this issue.

As counsel conceded at oral argument, the appellants did not raise this issue until after the verdict was returned. They did not propose jury instructions that would have excluded Lees from liability, nor did they move for JMOL on Lees's liability at the close of the evidence. Only in their post-trial motion for a new trial and for JMOL did they argue that Lees could not be held liable.

The failure to raise this issue prior to the return of the verdict results in a complete waiver, precluding our consideration of the merits of the issue. Federal Rule of Civil Procedure 50 requires that a motion for JMOL be made at the close of all the evidence in order to be renewed following entry of judgment. This Court strictly applies the rule that *Rule 50* allows complete waiver if an objection is not properly made. *See, e.g., Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 887 (9th Cir.2002) (refusing to review an issue even where it was raised in a Rule 50(b) motion after trial because " 'the requirement that [a JMOL] motion be made at the close of all the evidence is to be strictly observed' ") (quoting *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1346 (9th Cir.1986)). The district court therefore properly denied the appellants' post-trial motion.

III. Jury instructions on federal and state law discrimination

The jury instructions given by the district court for discrimination under § 1981 and under Washington law were substantially identical, differing only in that the federal law instruction required Zhang to show that his race was a "motivating factor" in the adverse employment action, while the state law instruction required him to show that his race

was a "substantial factor." Both instructions also stated that Zhang was "not required to prove that his race or national origin was the only factor or the main factor" in the adverse action. The appellants proposed additional instructions on the meaning of "motivating factor" and "substantial factor," and appeal the district court's rejection of these instructions. Reviewing the district court's decision for abuse of discretion, *Masson v. New Yorker Magazine*, 85 F.3d 1394, 1397 (9th Cir.1996), we find no error.

The general rule is that "the district court need not define common terms that are readily understandable by the jury." *United States v. Hicks*, 217 F.3d 1038, 1045 (9th Cir.2000) (collecting cases discussing terms that need not be defined, including "commercial advantage," "private financial gain," "violence," "organizer," "supervisor," and "manager"). The "motivating factor" instruction given conforms to the model federal instructions in § 1981 cases where both legal and illegal motives may be present: The jury should find for the plaintiff if it finds "by a preponderance of the evidence that race was a motivating factor, even though other factors also motivated the practice." Modern Fed. Jury Instr. Form Instr. 87-22AA (2002). The instruction also conforms to the model Ninth Circuit instructions, whose commentary expressly notes that "[t]he term 'motivating factor' may not require definition because of its common usage." 9th Cir. Civ. Jury Instr. 12.1 cmt. (2002). The appellants cite no cases in which this term has been explained, and we have recently read equivalent jury instructions to be adequately precise. *See, e.g., Costa v. Desert Palace*, 299 F.3d 838, 858 (9th Cir.2002) (en banc), *aff'd*, __ U.S. __, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003) (noting that in sex discrimination case,

jury was instructed, apparently without further definition, that "[i]f you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason").[4] While it might have been prudent for the district court to elaborate on this term, it was not an abuse of discretion not to do so.

As for the "substantial factor" language, the court's instruction likewise conforms to Washington's pattern instruction:

> To recover, plaintiff has the burden of proving that [his][her] [race] [sex] [age] [religion] [national origin] [marital status] was a [significant or] substantial factor in defendant's decision [to terminate][not to promote] [not to hire] [lay off][him][her]. Plaintiff does not have to prove

4. The term "motivating factor" is also routinely not defined in several other contexts. *See Lambert v. Ackerley*, 180 F.3d 997, 1008 (9th Cir.1999) (en banc), *cert. denied*, 528 U.S. 1116, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000), (noting that in Fair Labor Standards Act case, jury was instructed that one element was "[t]hat the protected activity was a substantial motivating factor in the adverse employment action"); *Sloman v. Tadlock*, 21 F.3d 1462, 1471 (9th Cir.1994) (approving, in First Amendment context, instruction that jury "must find that the plaintiff's protected [activity] . . . was a motivating factor in the defendants' decisions"); *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1474 (9th Cir.1993) (noting that, in Fourth Amendment context, jury had been instructed that "plaintiff must show by a preponderance of the evidence that his lawful refusal to obey the search order was a 'substantial factor' or a 'motivating factor' in the defendants' decision to terminate him").

> that [race] [sex] [age] [religion] [national origin] [marital status] was the only factor or the main factor in the decision, or that plaintiff would have been [retained] [hired] [promoted] but for [his][her] [race][sex][age] [religion] [national origin] [marital status].

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.01 (4th ed.2002). Neither the pattern instruction nor the commentary suggests that a definition of "substantial factor" is necessary. The Washington Supreme Court has noted, without disapproval, that trial courts have used jury instructions that conform to the pattern instructions and do not define "substantial factor." *See Delgado Guijosa v. Wal-Mart Stores, Inc.*, 144 Wash.2d 907, 32 P.3d 250, 254 (Wash.2001). The district court did not abuse its discretion in failing to define this term for the jury.

The appellants contend that the district court erred in rejecting its instructions because the terms "motivating factor" and "substantial factor" are equivalent, and that they were entitled to an instruction equating the two. This argument fails for the simple reason that they never sought such an instruction; the rejected instructions only elaborated on the meanings of these terms. Under the Federal Rules of Civil Procedure, in order to preserve objections against jury instructions, a party must "stat[e] distinctly the matter objected to *and the grounds of the objection.*" Fed.R.Civ.P. 51 (emphasis added); *see Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir.1991) (en banc) (noting that the Ninth Circuit "has enjoyed a reputation as the strictest enforcer of Rule 51"). The appellants never objected on the grounds that

the standards should be identical, nor did they assert that if they were exonerated from liability under one law, they must be exonerated under the other as well. They have waived any argument that the instructions should have equated these two terms.

IV. Allegedly inconsistent verdicts

At the heart of this appeal is the appellants' argument that the verdict returned by the jury is irreconcilably inconsistent. According to the appellants, three elements of the jury verdict are inconsistent: first, that the jury found the corporate defendants liable for discrimination but found Lees not liable; second, that the jury found the corporate defendants liable for discrimination under § 1981 but not under Washington law; and third, that on the breach of contract claim the jury awarded more in double damages than it had awarded in damages for the same claim. Although these alleged inconsistencies present several intersecting legal issues, we conclude that none of them is cause to vacate the judgment or to order a new trial.

A. General and special verdicts

As an initial matter, and one that is not inconsequential to the legal analysis of these claims, the parties disagree as to the nature of the verdicts at issue. The Federal Rules of Civil Procedure explicitly contemplate two types of verdicts, special verdicts, *see* Fed.R.Civ.P. 49(a), and general verdicts with interrogatories, *see* Fed.R.Civ.P. 49(b), and implicitly contemplate common law general verdicts without interrogatories. Both special verdicts and interrogatories

comprise only factual findings; a special verdict is "in the form of a special written finding upon each issue of fact," Fed.R.Civ.P. 49(a), and interrogatories are returned "upon one or more issues of fact the decision of which is necessary to a verdict," Fed.R.Civ.P. 49(b).

The Federal Rules do not define general verdicts, but they imply that general verdicts do not involve factual findings but rather ultimate legal conclusions. *See id.* This view is of course consistent with the common law and our own caselaw; in *Floyd v. Laws*, 929 F.2d 1390 (9th Cir.1991), we held that the theoretical distinction between general and special verdicts is that general verdicts require the jury to apply the law to the facts, and therefore require legal instruction, whereas special verdicts "compel the jury to focus exclusively on its fact-finding role." *Id.* at 1395. Black's defines a general verdict as "[a] verdict whereby the jury find either for the plaintiff or for the defendant in general terms." Black's Law Dictionary 1560 (6th ed.1990). Thus in a general verdict the jury announces only the prevailing party on a particular claim, and may announce damages.

A jury may return multiple general verdicts as to each claim, and each party, in a lawsuit, without undermining the general nature of its verdicts. *See, e.g.*, 9A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2504.1 (2d ed. Supp.2003) ("In cases involving multiple claims . . . or defendants, the district court may ... have the jury render multiple general verdicts."). Although some general verdicts are more general than others, encompassing multiple claims, the key is not the number of questions on the verdict form, but whether the jury announces the ultimate

legal result of each claim. If the jury announces only its ultimate conclusions, it returns an ordinary general verdict; if it makes factual findings in addition to the ultimate legal conclusions, it returns a general verdict with interrogatories. If it returns only factual findings, leaving the court to determine the ultimate legal result, it returns a special verdict.

These terms are not adequate to capture every answer that a jury may give. In addition to the ultimate legal conclusion in a case, a jury may make legal conclusions as to subsidiary issues, such as affirmative defenses, or the amount of damages owed, which are neither findings of fact nor quite "verdicts." Such answers are similar in kind to general verdicts, because they require application of the law to the facts, but we have found no precise label for them.

In this case, the jury returned general verdicts, with separate determinations as to damages, for nearly every claim, making virtually no factual findings. Of the thirteen questions on the verdict form, eleven were either of the form "Do you find for [the] plaintiff?" or "What total amount of [damages] [punitive damages] [lost wages] do you award?" All of the discrimination claims were disposed of by such questions; therefore, each of the alleged inconsistencies in the discrimination claims arises between two general verdicts.

The only area in which the jury made factual findings relates to double damages. After finding that the defendants were liable for lost wages on Zhang's breach of contract claim, the jury was asked two questions: "Do you find that any wages or benefits were willfully withheld with intent to deprive plaintiff of wages or benefits required by the

contract?" and "What amount of wages or benefits were willfully withheld during the period from the date of termination until September 29, 1999?" On this one issue the jury returned a special verdict, leaving to the trial court the duty to apply the law and determine that Zhang was entitled to double damages for all wages and benefits willfully withheld. With respect to double damages, therefore, the appellants allege an inconsistency between a subsidiary legal conclusion (the award of damages for breach of contract) and one of the factual findings in a special verdict (the amount of wages willfully withheld).

B. Inconsistencies between legal conclusions

We contemplate three ways in which legal conclusions such as general verdicts might be alleged to be inconsistent: the jury might disregard instructions requiring two general verdicts to be harmonious; the jury might return a general verdict that, under the facts of the case, implies a lack of evidence underlying another general verdict; or the jury might return two general verdicts that, under any facts, seem to be legally irreconcilable. The latter two situations are presented here. In the split verdict between the corporate defendants and Lees on the § 1981 claim, the appellants claim that although it is legally possible for a corporation to be held liable for discrimination while its agent is exonerated (because, among other reasons, the corporation may have acted through other agents), in this case there was no evidence that anyone other than Lees committed any discriminatory acts, and thus the verdict fails for insufficient evidence. As to the discrepancy between the federal and state discrimination claims, the appellants argue that these claims

are legally indistinguishable under any set of facts and thus that no rational jury could find liability on one and not the other claim.

1. Sufficiency of the evidence

The appellants' sufficiency of the evidence argument fails because it was not raised before the close of all the evidence.[5] The appellants made a post-verdict motion for JMOL based on insufficiency of the evidence, but failed to meet the ordinary requirement that a motion for JMOL must first be brought at the close of all the evidence. *See* Fed.R.Civ.P. 50(b); *Janes*, 279 F.3d at 887.

The appellants suggest that the ordinary waiver rules for JMOL do not apply here because the sufficiency of the evidence issue arose only due to the jury's split liability findings, relying upon *Pierce v. Southern Pacific Transportation Co.*, 823 F.2d 1366 (9th Cir.1987). In *Pierce*, we held that where a jury had returned a special verdict, a challenge to the consistency of its answers could be raised in a post-verdict motion for JMOL even though no pre-verdict motion had been made. *Id.* at 1369. But *Pierce* was specifically limited to the context of a special verdict, and inapplicable to a case such as this in which the jury returned a general verdict:

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5. Our discussion is not intended to imply that, were we to review the verdict for sufficiency of the evidence and search for evidence of discrimination other than Lees's conduct, we would find such evidence lacking. The facts set out above include several lines of evidence apart from Lees's actions suggesting that Zhang was fired due to his race or national origin.

Appendix A

> [J]ust as a motion for directed verdict is not required to preserve the question whether a judgment is supported by the jury's special verdict, a motion for directed verdict need not be a condition precedent for JNOV when the challenge is to the consistency of answers under a Rule 49(a) special verdict, *and not to the sufficiency of evidence supporting a general verdict.*

Id. (emphasis added).

A close analysis of *Pierce* demonstrates that although our inquiry was styled as a review of the consistency of the special verdict answers, it really was indistinguishable from review of whether the special verdict answers supported the judgment of the trial court. The basic issue in *Pierce* was whether, under the facts of that case, a particular factual finding nullified the defendant's liability, regardless of any other factual findings that might suggest that the defendant was liable. *See id.* at 1370 (noting that the defendant's view was that one of the jury's findings negated its negligence "as a matter of law"). Thus the real question was whether the jury's factual findings required judgment for the plaintiff or the defendant, a question that is simply irrelevant where, as here, no factual findings are at issue.

The inapplicability of *Pierce* to general verdicts is demonstrated by subsequent Ninth Circuit caselaw. In *Vaughan v. Ricketts*, 950 F.2d 1464 (9th Cir.1991), we considered the internal consistency of a general verdict in which the jury determined that the defendants had violated the plaintiff's constitutional rights, but nonetheless found

that the defendants were entitled to qualified immunity. *Id.* at 1466. As in *Pierce*, the plaintiffs filed a post-verdict motion for JMOL and appealed its denial, challenging the sufficiency of the evidence to support both the qualified immunity finding and the determination of liability. *Id.* at 1466, 1470. But in contrast to *Pierce*, the court held that "where inconsistent verdicts are alleged, the test is not whether there was substantial evidence for the jury's conclusion, but whether it is *possible to reconcile* the verdicts." *Id.* at 1470. Because it was possible for a jury to find qualified immunity and a violation of constitutional rights, there was no need to determine whether the facts presented supported such a verdict. *Id.* Although *Vaughan* involved an alleged inconsistency between a general verdict and a subsidiary legal conclusion on an affirmative defense, it is similar to the instant case in that it involved discrepancies between two legal conclusions, rather than the adequacy of factual findings to support a judgment.

Thus, unless the alleged inconsistency involves the sufficiency of the jury's factual findings to support the ultimate legal conclusion,[6] the defendant must raise the issue prior to submission to the jury in order to preserve any objections to sufficiency of the evidence. We see two

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6. Although in a special verdict case such as *Pierce* the determination of liability is made by the trial court after reviewing the jury's factual findings, the same review of alleged inconsistencies applies to a general verdict with interrogatories where the jury itself determines liability as well as facts. *See* Fed.R.Civ.P. 49(b) (providing that where a general verdict is unsupported by specific interrogatories the court may resubmit the issues to the jury, vacate the judgment for a new trial, or enter judgment according to the interrogatories).

compelling rationales for such a strict waiver rule. The opinion in *Pierce* itself explains that "[t]he rationale [for waiver] is clearly to prevent a review of the sufficiency of the evidence when the moving party has not given notice" of its objection "while there is still an opportunity for the opposing party to cure any defects in proof." 823 F.2d at 1369. Here, if the appellants believed that there was no evidence to support a split verdict—in other words, that if the jury found no liability for Lees, there was no evidence on which it could base a finding of liability for the corporate defendants—they should have raised their concern at the close of the evidence, such that Zhang could have, if necessary, introduced more evidence about the corporate defendants' liability. But not having raised the issue before the matter was submitted to the jury, the appellants cannot complain of a defect in proof for the resulting verdict.

The second reason for waiver is the promotion of efficiency in the trial court. If the appellants had timely made an objection to the sufficiency of the evidence to support a split verdict, and their objection had been upheld, they would have been entitled to an instruction preventing the jury from finding liability for the corporate defendants unless the jury also found liability for Lees. As it happened, however, the jury was left with instructions that did not forbid, and at least implicitly authorized, the result that it returned. We cannot sanction the time and expense of a new trial on the basis of an alleged inconsistency that, had it been raised earlier, could have been remedied by proper instructions to the jury.

This rule is consistent with the approach of our sister circuits. In *Jarvis v. Ford Motor Co.*, 283 F.3d 33 (2d Cir.), *cert. denied*, 537 U.S. 1019, 123 S.Ct. 539, 154 L.Ed.2d 427 (2002), the Second Circuit considered a similar case in which the defendant made an objection to the sufficiency of the evidence to support two different general verdicts. *Id.* at 54-56. The court applied a strict waiver rule, holding that where "any potential error related to the jury instructions and the verdict sheet," the defendants "objection needed to conform to the strictures of Fed.R.Civ.P. 51." 283 F.3d at 54. Furthermore, although the appellants rely heavily on the Tenth Circuit's opinion in *Heno v. Sprint/United Management Co.*, 208 F.3d 847 (10th Cir.2000), that case, like *Pierce*, involved the sufficiency of factual findings in a special verdict to support the ultimate determination of liability. *Id.* at 851 (noting that waiver does not apply to special verdicts). The court held that a factual finding that a corporation's agent did not discriminate precluded a legal conclusion that the corporation was liable for discrimination. *Id.* at 852. Nothing in *Heno* suggests that, when the jury returns a general verdict, an inconsistency between conclusions as to liability on different claims requires vacating the judgment.

2. Legal irreconcilability

The appellants' claim that the split verdict between the federal law and Washington state law discrimination claims is inconsistent fails because such inconsistencies, when permitted by jury instructions, are simply not reviewable

upon appeal.[7] Unless one legal conclusion is the prerequisite for another, inconsistencies between them must stand.

Zhang argues that the appellants have waived this argument entirely because they failed to raise it at all before the district court. As discussed above, the appellants did propose jury instructions on discrimination under federal and state law, but these proposed instructions did not address the contention that liability for both claims was necessarily coextensive. We could, therefore, ignore this issue entirely because it was never raised below, but "we may consider an issue raised for the first time on appeal if . . . the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court." *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir.1990). We consider the issue of the legal equivalency of two claims to be a purely legal issue, and Zhang is in the same position as he would have been had this issue been raised in a Rule 59 motion for a new trial; he

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7. Again, we do not mean to imply that such an inconsistency is present here. Although the appellants cite federal caselaw that suggests that the definitions of "substantial factor" and "motivating factor" under federal law are interchangeable, they cite no caselaw that indicates that the federal definition of "motivating factor" is equivalent to the Washington law definition of "substantial factor." The "substantial factor" test under Washington law was set out in *Mackay v. Acorn Custom Cabinetry*, 127 Wash.2d 302, 898 P.2d 284, 288 (1995). *Mackay* did not suggest that this test was equivalent to the test under federal law, and no subsequent Washington or Ninth Circuit decision has done so.

is not prejudiced. We will therefore treat this claim as if it had been raised in a motion for a new trial.[8]

Nonetheless, even if the error had been raised before the district court, we could not grant a new trial on the basis of legally irreconcilable general verdicts. Rule 59 does not specify the grounds on which a motion for a new trial may be granted; instead, it allows such a motion to be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed.R.Civ.P. 59(a). We are thus bound by those grounds that have been historically recognized.

We have found no Supreme Court or Ninth Circuit cases in which an appellate court has directed the trial court to grant a new trial due to inconsistencies between general verdicts, and Ninth Circuit precedent dictates that we cannot do so. In *International Longshoremen's Union v. Hawaiian Pineapple Co.*, 226 F.2d 875 (9th Cir.1955), we explained that legally inconsistent verdicts "may nonetheless stand on appeal even though inconsistent." *Id.* at 881. In that case, the jury had returned general verdicts holding the defendant unions liable while "exonerating the individual defendants" who had acted on behalf of the unions. *Id.* While the court admitted difficulty in understanding "why the jury found [the unions] liable and did not also hold some of the leaders

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8. We cannot treat this claim as if it had been raised earlier than the motion for a new trial stage. If it had been raised earlier, in jury instructions or in a motion for resubmission immediately after the jury had returned the verdict, the result might have been different, and thus Zhang would be prejudiced by the appellants' failure to raise the issue at these points.

responsible," *id.*, it upheld that jury's right to do so. "That is the jury's prerogative." *Id.*

We are confident that this rule is historically sound and remains the majority rule. In *Jayne v. Mason & Dixon Lines*, 124 F.2d 317 (2d Cir.1941), Judge Learned Hand stated in *dicta* that it would not have been fatal to a split general verdict "if no rational reconciliation of the verdicts was possible." *Id.* at 319. More recently, in *Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986), Justice Stevens cited *Jayne* among the authorities supporting the proposition that "a court retains the authority, even in a civil case, to allow an apparently inconsistent verdict to stand." *Id.* at 805 n. 12 (Stevens, J., dissenting).[9] *See also Westinghouse Elec. Corp. v. Gen. Circuit Breaker & Elec. Supply Inc.*, 106 F.3d 894, 902 (9th Cir.1997) (noting without disapproval a litigant's observation that "the law forbids a judge from upsetting general verdicts merely because they are inconsistent as to different claims"); *Mosley v. Wilson*, 102 F.3d 85, 90 (3d Cir.1996) (discussing *Heller*); *Arthur Pew Constr. Co. v. Lipscomb*, 965 F.2d 1559, 1571 (11th Cir.1992) ("No authority is suggested to us that requires that general verdicts be harmonious. . . ."); *Hines v. IBG Int'l, Inc.*, 813 F.2d 1331, 1334 (4th Cir.1987) (in a case involving "general verdicts, incapable of being nicely dissected into their

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9. This particular point of Justice Stevens's dissent was not contradicted by the majority opinion for the Court, which held that in a bifurcated trial, the jury's exoneration of a government agent in the first portion of the trial precludes a finding in the second portion of the trial that the government agency is liable. *See Heller*, 475 U.S. at 797-99, 106 S.Ct. 1571 (per curiam). The majority's holding, of course, is dictated by the basic principles of collateral estoppel.

constituent parts," an "apparent inconsistency is not fatal"); *Merchant v. Ruhle*, 740 F.2d 86, 91 (1st Cir.1984) (expressing, in a case involving split general verdicts on two claims, "a substantial reluctance to consider inconsistency in civil jury verdicts a basis for new trials"); *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1290 n. 7 (2d Cir.1969) ("[C]onsistent jury verdicts are not, in themselves, necessary attributes of a valid judgment."); *U.S. Football League v. Nat'l Football League*, 644 F.Supp. 1040, 1045-46 (S.D.N.Y.1986); *Malm v. United States Lines Co.*, 269 F.Supp. 731, 731-732 (S.D.N.Y.), aff'd, 378 F.2d 941 (2d Cir.1967) (per curiam) ("Inconsistent jury verdicts upon different counts or claims are not an anomaly in the law, which at times recognizes a jury's right to an idiosyncratic position, provided the challenged verdict is based upon the evidence and the law."); Alexander M. Bickel, *Judge and Jury-Inconsistent Verdicts in the Federal Courts*, 63 Harv. L.Rev. 649, 654-55 (1950) (arguing that the rule in criminal cases that inconsistent verdicts are allowed to stand should also apply in civil cases). *But see Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F.2d 1416, 1425 (10th Cir.1986) (stating in *dicta* that in "cases where the several causes of action are identical and defended on the same ground, a verdict for the plaintiff on one cause of action and for the defendant on another is inconsistent"); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 677 (7th Cir.1985) ("As a rule civil juries must return consistent verdicts. . . . The civil jury has no power to dispense clemency, and verdicts in the teeth of the evidence may be set right." (citations omitted)); Shaun P. Martin, *Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts*, 28 Creighton L.Rev. 683, 708 (1995) (opining, after noting that many federal

courts accept inconsistent general verdicts, that this view "is almost certainly wrong").

Another persuasive line of cases involves discrepancies between findings of liability and damage awards, typically arising when a jury finds liability but nonetheless awards zero damages. As noted above, the damage award is not really a separate general verdict, but it is nonetheless a legal conclusion, and so these types of cases also involve purported conflicts between two legal conclusions. In *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 53 S.Ct. 252, 77 L.Ed. 439 (1933), the Supreme Court refused to disturb such a verdict, even though the petitioner had urged that "the verdict should have been set aside as inconsistent on its face." *Id.* at 483, 53 S.Ct. 252. Justice Brandeis wrote that the trial court's "refusal to grant a new trial cannot be held erroneous as a matter of law. Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." *Id.* at 485, 53 S.Ct. 252. This rule retains vitality, and we have noted that "the federal rule is that failure to award damages does not by itself render a verdict invalid." *Philippine Nat'l Oil Co. v. Garrett Corp.*, 724 F.2d 803, 806 (9th Cir.1984).

The only circumstance in which we have reviewed the consistency of two legal conclusions is that presented in *Vaughan*, in which the jury makes multiple legal conclusions relating to a single claim, one of which may be legally predicated on another. The *Vaughan* jury had returned two legal conclusions, neither of which was the ultimate verdict: It had found that the defendants were entitled to qualified

immunity, and that the defendants had violated the plaintiffs' constitutional rights. *See* 950 F.2d at 1466. We did not, as noted above, examine whether these split findings could be supported by sufficient evidence, but we did conduct some review, examining whether it was "*possible to reconcile* the verdicts." *Id.* at 1470. Concluding that it was not legally impossible for a jury to make both of these conclusions, we upheld the verdict. *Id.*

In this case, there is no legal reason that the verdicts on the two discrimination claims would have had to be identical. Neither is predicated on the other, nor is exoneration from discrimination under state law an affirmative defense to discrimination under federal law. Instead, this is exactly the type of apparent inconsistency between general verdicts that has long been allowed to stand in this Circuit and others.

Like defects in the sufficiency of the evidence, the potential for a legally irreconcilable verdict should be addressed through jury instructions properly proposed under Rule 51. *See Jarvis*, 283 F.3d at 56 ("Objection to an inconsistency between two general verdicts that is traced to an alleged error in the jury instruction or verdict sheet is properly made under Fed.R.Civ.P. 51."); *Merchant*, 740 F.2d at 91 (noting that the defendant had agreed to instructions allowing the jury to find liability on either of two claims). Under Rule 51, instructional errors are waived if not raised in a timely fashion. "To excuse [the appellants] from the well-established rules of waiver would permit the sort of 'sandbagging' that the rules are designed to prevent, while undermining the ideal of judicial economy that the rules are meant to serve." *Jarvis*, 283 F.3d at 62. The appellants might

have thought that it was advantageous *not* to propose instructions equating the claims alleging discrimination under federal and Washington law, because the jury then might have concluded that they were liable on both claims.

C. Inconsistencies in special verdicts and interrogatories

Inconsistencies involving findings of fact, such as those in special verdicts and interrogatories, may arise in similar ways as inconsistencies between general verdicts. First, a jury may return answers that plainly violate its instructions. Second, under the evidence presented in the case, one or more findings of fact may be inconsistent with a determination of liability, whether that determination is made by the jury (as in a general verdict with interrogatories) or by the trial court (as in a special verdict). This sort of inconsistency was alleged in *Pierce. See* 823 F.2d at 1370. Finally, one or more findings of fact may be legally irreconcilable with each other or with a legal conclusion. Here, the appellants argue that the jury's answers on the breach of contract claim, awarding $86,000 in damages while finding $87,500 in wages willfully withheld, presents the third type of inconsistency because it is legally impossible for double damages to exceed base damages and for an employer to withhold willfully more wages than are due.

The typical case of factual findings conflicting with legal conclusions arises in the context of a special verdict or a general verdict with interrogatories. In the case of a special verdict, inconsistencies are problematic and require a new trial only if they arise between two or more factual findings; otherwise, the determination of liability can simply be

conformed to the factual findings. Similarly, in the case of a general verdict with interrogatories, the trial court has the discretion to enter judgment on the factual findings, even if they conflict with the jury's conclusion as to liability, *see* Fed.R.Civ.P. 49(b); only if there is a conflict within the factual findings would a new trial be required.

The alleged inconsistency here, however, arises not between two factual findings, or between a factual finding and the ultimate determination of liability, but between a factual finding and subsidiary legal conclusion within a single claim. On the issue of double damages, the trial court is required to enter judgment according to the jury's factual findings, awarding damages of $87,500; but to do so would conflict with the jury's legal conclusion as to the base damages, which it found to be $86,000. Although both damage awards are legal conclusions, this inconsistency does present a problem of legal irreconcilability because double damages are normally predicated upon, and cannot exceed, base damages. Thus if the trial court were to have followed the principle that judgment should be entered according to the jury's factual finding, it would have entered an apparently irreconcilable verdict where double damages exceeded base damages.

The district court's actual response to this dilemma was to remit the double damages award to $86,000, thus preventing any irreconcilable conflict in the final judgment. But a trial court cannot ignore the jury's factual findings in an attempt to reconcile the ultimate legal conclusions; to the contrary, legal conclusions should be conformed to the factual findings, if at all possible. We must determine whether the

jury's answers were truly irreconcilable, because if they were, remittitur could not save the verdict.[10]

The appellants bear a high burden to establish an irreconcilable inconsistency. The Seventh Amendment to the Constitution guarantees that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States" except "according to the rules of the common law." We must accept any reasonable interpretation of the jury's actions, reconciling the jury's findings "by exegesis if necessary," *Gallick v. Baltimore & O. R.R. Co.*, 372 U.S. 108, 119, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963); "a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment." *Atl. & Gulf Stevedores, Inc. v. Ellerman Lines*, Ltd., 369 U.S. 355, 364, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962). Furthermore, we review the consistency of the jury's verdict "in light of the instructions given." *Grosvenor Properties, Ltd. v. Southmark Corp.*, 896 F.2d 1149, 1151 (9th Cir.1990).

The jury was specifically instructed to award damages for breach of contract *exclusive* of damages previously awarded for discrimination:

> [I]f you find for plaintiff on his sixth claim for breach of contract, your damage award for that claim must be limited to the lost wages and benefits from the date of termination to September

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10. Because the remittitur reduced Zhang's recovery, only Zhang would have standing to challenge it on appeal. He did not do so, and we therefore have no occasion to correct the trial court's improper remittitur.

> 29, 1999. Any damages you award for plaintiff's sixth claim should *not* include any damages you have previously awarded plaintiff on his [discrimination claims].

In other words, the jury was instructed not to double-count any lost wages that had been withheld due to discrimination and awarded as damages on the discrimination claim. For double damages, the jury was simply asked how much in wages and benefits had been willfully withheld from Zhang prior to September 29, 1999; the jury was given no similar instruction against double-counting.

We agree with the district court's analysis that these answers can be reconciled because some of the lost wages likely were awarded as damages for the discrimination claim. If the jury had determined that at least $1500 of Zhang's wages prior to September 29, 1999, had been withheld due to discrimination and awarded that amount as part of the damages for discrimination, there would be no inconsistency. The total amount of lost wages and benefits, including those awarded as part of the discrimination award, may have been substantially greater than $86,000 or $87,500.[11]

11. Put another way, the similarity between the $87,500 double damages figure and the $86,000 damages figure may be entirely coincidental. The evidence in the record suggests that Zhang's lost wages and benefits up to September 29, 1999, could have been as much as $97,800. The jury could have, for example, determined that $11,800 of this figure was attributable to discrimination and that $87,500 of this figure was willfully withheld. It then would have included the $11,800 award in the discrimination claim, awarded the remaining $86,000 for breach of contract, and awarded an additional $87,500 in double damages for wages willfully withheld.

Appendix A

Washington law allows for double damages for lost wages and benefits that were willfully withheld, but it does not specify that lost wages also awarded as damages for another claim, and not double-counted for the breach of contract claim, cannot form the basis for doubling. Thus, under applicable law, it was possible for the jury to award more in double damages than in damages for the breach of contract claim, because some of the damages that otherwise would have been awarded for breach of contract were already awarded for discrimination. It is a reasonable possibility that the jury was not confused and that its answers were not inconsistent. In such a case, we must honor the jury's verdict.

The trial court did not err in refusing to vacate the jury's damages awards for breach of contract. The verdict was not irreconcilable, and the deference owed to jury verdicts under the Seventh Amendment requires that any reconcilable verdict must stand.

V. Damage awards

In addition to the discrepancy in the breach of contract damages discussed above, the appellants challenge the awards for both compensatory damages and punitive damages on Zhang's discrimination claim. We agree with the district court that both awards were justified.

A. Supportability of the compensatory damages award

The jury awarded Zhang $360,000 in compensatory damages on his discrimination claim, which the appellants claim is excessive compensation for emotional distress and

not supported by substantial evidence. They concede that at least $136,845 of this amount could be attributed to economic damages,[12] but maintain that the evidence is insufficient to support awarding the remaining $223,155 for emotional distress. This argument was first raised after the verdict in a motion for a new trial, and we "will not overturn a district court's denial of a motion for a new trial absent a clear abuse of discretion." *Desrosiers v. Flight Int'l of Fla., Inc.*, 156 F.3d 952, 957 (9th Cir.1998).

As an initial matter, we disagree with the appellants' calculation of economic damages. Although the appellants concede that the jury could have awarded Zhang back pay and front pay totaling $136,845 for the years 1999-2002, they argue that the jury could not have awarded bonuses for these years, even though Zhang's contract allowed a $25,000 annual performance bonus. We hold that the jury reasonably could have awarded bonuses for these years; the evidence in the record demonstrates that in 1998, the year before he was terminated, Zhang exceeded his performance goal and had the highest sales of any American Gem employee. The jury reasonably could have concluded that Zhang would have continued his outstanding work performance, entitling him to bonuses in each of the following four years and an additional $100,000 in economic damages. Thus the jury

12. The appellants concede that Zhang demonstrated up to $222,845 in economic damages. As noted above, however, the jury was instructed not to double-count damages awarded for the § 1981 claim and breach of contract, and so the $86,000 in damages awarded for breach of contract should be deducted from this amount to determine how much of the jury's § 1981 award could be attributed to economic damages.

could have awarded up to $236,845 in economic damages, leaving only $123,155 in compensation for emotional distress.

Regardless of whether the figure for emotional distress damages should be $223,155 or $123,155, however, we will not disturb the award. "We may reverse a jury's finding of the amount of damages if the amount is grossly excessive or monstrous." *Lambert v. Ackerley*, 180 F.3d 997, 1011 (9th Cir.1999) (en banc), *cert. denied*, 528 U.S. 1116, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000). Although the appellants argue that emotional distress damages must be supported by substantial evidence, they cite no Ninth Circuit caselaw to support this proposition, instead relying on the Fourth Circuit case *Price v. City of Charlotte*, 93 F.3d 1241, 1251 (4th Cir.1996). The holding of *Price* that "the evidence of the emotional distress must be demonstrable, genuine, and adequately explained," *id.* at 1251, is not the law of this Circuit:

> While objective evidence requirements may exist in other circuits, such a requirement is not imposed by case law in . . . the Ninth Circuit, or the Supreme Court. *See Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir.1985) (upholding emotional damages based solely on testimony); *Johnson v. Hale*, 13 F.3d 1351, 1352 (9th Cir.1994) (noting that emotional damages may be awarded based on testimony alone or appropriate inference from circumstances); *Carey v. Piphus*, 435 U.S. 247, 264 n. 20, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (noting that emotional

distress damages are "essentially subjective" and may be proven by reference to injured party's conduct and observations by others).

Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 513 (9th Cir.2000) (citation and parallel citations omitted). In *Passantino*, we upheld a $1,000,000 compensatory emotional distress damage award—in addition to $2,200,000 in economic damages—for a retaliatory discharge of an employee who complained of sex discrimination. *Id.* at 510-14.

Zhang's testimony alone is enough to substantiate the jury's award of emotional distress damages. Zhang testified that the job at American Gem was "my dream, working in this country," and that when he was terminated, he was "troubled," and "couldn't believe" it. He testified that when American Gem sent letters to his suppliers stating that he had been terminated, the Chinese version of the letters made it seem like "I was either criminal or something very bad." He stated that the termination "very, very hurt my dignity and reputation," because the letters went to suppliers in Dalian, China, his hometown, and "people think there must be something wrong, because Wei is doing something wrong in the States." He testified that people from China called him, concerned about the letters, and that American Gem "ruined my future business. . . . Because doing business in China, your reputation and your credibility is the key." Despite the fact that his testimony was hampered by language and translation problems, the jury obviously could have gleaned that he was greatly hurt and humiliated by his termination and the manner in which it was carried out. Under

Passantino, this testimony is more than sufficient to support a substantial compensatory damage award for emotional distress. The award of compensatory damages was not "grossly excessive or monstrous." *Lambert*, 180 F.3d at 1011. The district court committed no error, let alone a clear abuse of discretion, in denying the motion for a new trial on this basis.

B. Supportability of the punitive damages award

The jury awarded Zhang $2,600,000 in punitive damages on his discrimination claim against the corporate defendants, which the appellants argue is not supported by substantial evidence. The appellants first raised this objection in their post-trial motions for a new trial and for JMOL, arguing that punitive damages should not be available at all. Zhang counters that this objection has been waived.

Ordinarily, this Court can strike down a jury award of punitive damages if the evidentiary prerequisites to such an award are not supported by substantial evidence. *Lambert*, 180 F.3d at 1012. In a federal employment discrimination suit such as this one, punitive damages are available against an employer who " 'discriminate[s] in the face of a perceived risk that its actions will violate federal law.' . . . [A]lthough egregious conduct could be evidence of intent to break the law, such conduct [is] not required to establish punitive damages liability. Thus, in general, intentional discrimination is enough to establish punitive damages liability." *Passantino*, 212 F.3d at 515 (quoting *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999)) (first alteration in original). Review of the sufficiency

of the evidence to support punitive damages would thus be nearly identical to substantial evidence review for liability for discrimination.

Just as our review of the evidence supporting the corporate defendants' liability for discrimination is foreclosed by waiver, however, our review of the evidence supporting the availability of punitive damages is limited because the appellants did not raise the issue until after trial. As noted above, in general, a challenge to the sufficiency of the evidence must be made in a Rule 50(a) motion for JMOL at the close of the evidence in order to be renewed in a Rule 50(b) motion for JMOL after trial. Fed.R.Civ.P. 50(b); *Janes*, 279 F.3d at 887. In *Kelly v. City of Oakland*, 198 F.3d 779 (9th Cir.1999), we held that this rule governs review of the evidence supporting punitive damages, concluding that where the defendant did not object to the jury instructions on punitive damages, and did not challenge the sufficiency of the evidence to support punitive damages in his Rule 50(a) motion, he could not raise the issue in a Rule 50(b) motion. *Id.* at 786. The same situation is presented here; the record does not reflect that the corporate defendants objected to instructions allowing the jury to award punitive damages, nor that they made any objection to the sufficiency of the evidence for a punitive damages award at the close of the evidence.

As in their challenge to the sufficiency of the evidence underlying the liability finding, however, the appellants argue that the waiver rules are different where the issue of evidentiary sufficiency is raised only by the alleged inconsistency in the jury's verdict. According to this

argument, although the evidence at trial might have been sufficient to support a punitive damages award, it could not support such an award in the absence of a finding of liability against Lees.

We will apply the same rules to review of the punitive damages award as we did to the liability finding. If the appellants believed that there was insufficient evidence to support punitive damages unless the jury found that Lees was liable for discrimination, they should have pointed this out prior to submission of the case to the jury, thereby giving Zhang the opportunity to correct any defects in proof. The appellants could have requested a jury instruction that would have allowed the jury to find punitive damages only if they found Lees liable for discrimination. Having failed to do so, they cannot now challenge the sufficiency of the evidence supporting the damage award.[13]

C. Constitutionality of the punitive damages award

Even though the jury's decision to award punitive damages was supported by substantial evidence, we must also determine whether the amount of the award is unconstitutionally excessive. In recent years, the Supreme

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13. The appellants' contention that this issue arose only due to the alleged inconsistency in the verdict, which could not have been foreseen, is somewhat disingenuous. In their motion for JMOL after the verdict was returned, in which they first raised their argument regarding punitive damages, the argument was styled "The Court should not have instructed the Jury on Punitive Damages." Clearly, the appellants recognized that this was an instructional issue and could have been raised at an earlier point.

Court has recognized a due process right to be free from excessive punitive damages. The appellants argue that the $2,600,000 award here was excessive and should be reduced to some unspecified amount. Even though the appellants only raised this issue in post-trial motions, the Supreme Court has ruled that the appellate courts should review the district court's denial of remittitur of the award de novo. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001).

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), the Supreme Court first announced "[t]hree guideposts" for assessing the constitutionality of punitive damage awards: "the degree of reprehensibility of the[defendant's conduct]; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *Id.* at 574-75, 116 S.Ct. 1589. *BMW* was the first time the Court had ever struck down a punitive damages award as unconstitutionally excessive; the Court reaffirmed *BMW* in questioning the size of a punitive damages award in *Cooper Industries*, 532 U.S. at 440-43, 121 S.Ct. 1678, and recently followed *BMW* in striking down another punitive damages award in *State Farm Mutual Insurance Co. v. Campbell*, __ U.S. __, __ - __, 123 S.Ct. 1513, 1521-26, 155 L.Ed.2d 585 (2003). In addition to these Supreme Court precedents, our analysis herein is guided by our decision in *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir.2001), *cert. denied*, 535 U.S. 1018, 122 S.Ct. 1609, 152 L.Ed.2d 623 (2002), in which we applied the *BMW* guideposts to a § 1981 discrimination case. *Id.* at 817-20, 116 S.Ct. 1589.

Appendix A

1. Reprehensibility

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S. at 575, 116 S.Ct. 1589. The appellants rest their constitutional challenge entirely on the reprehensibility guidepost, relying on the *BMW* Court's statement, made even before analyzing the other two factors, "that BMW's conduct was not sufficiently reprehensible to warrant imposition of a $2 million exemplary damages award." 517 U.S. at 580, 116 S.Ct. 1589.

The gulf between the reprehensibility of the corporate defendants' actions here and the conduct at issue in *BMW*, *Cooper Industries*, and *State Farm*, however, is substantial. In *BMW*, the defendant automaker had fraudulently failed to disclose its practice of selling cars as new after repairing minor predelivery damage. 517 U.S. at 563-64, 116 S.Ct. 1589. In *Cooper Industries*, the defendant had been found liable for falsely advertising another competitor's product as its own. 532 U.S. at 427-29, 121 S.Ct. 1678. In *State Farm*, the defendant insurance company had implemented a fraudulent policy of limiting costs by refusing to settle insurance claims and then capping claims payments after losing at trial. __ U.S. at __-__, 123 S.Ct. at 1517-19. Although the plaintiffs in *State Farm* did allege emotional distress, *id.* at 1518, the reprehensibility of the fraudulent business practices at issue in these Supreme Court cases is different in kind from the reprehensibility of intentional discrimination on the basis of race or ethnicity.

Although *BMW* held that "purely economic" harms are less likely to warrant substantial punitive damages awards, 517 U.S. at 576, 116 S.Ct. 1589, intentional discrimination is a different kind of harm, a serious affront to personal liberty. *See Romano v. U-Haul Int'l, Inc.*, 233 F.3d 655, 673 (1st Cir.2000), *cert. denied*, 534 U.S. 815, 122 S.Ct. 41, 151 L.Ed.2d 14 (2001) (finding that a plaintiff's termination on the basis of her sex was "more reprehensible than would appear in a case involving economic harms only"). There can be no question of the importance of our society's interest in combating discrimination; this nation fought the bloodiest war in its history in part to advance the goal of racial equality, adding several amendments to the Constitution to cement the battlefield victory. *See* U.S. Const. amends. XIII, XIV, XV. Freedom from discrimination on the basis of race or ethnicity is a fundamental human right recognized in international instruments to which the United States is a party, *see, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, *adopted by the U.N. General Assembly* Dec. 21, 1965, 660 U.N.T.S. 195 (*entered into force for the United States* Nov. 20, 1994), and the intentional deprivation of that freedom is highly reprehensible conduct.[14]

Racial discrimination often results in large punitive damage awards. *See Swinton*, 270 F.3d at 817-18 (finding that an employer's failure to address a pattern of racial slurs and harassment was sufficiently reprehensible to support a

---

14. Indeed, the appellants' argument seems to depend on the position that the corporate defendants did not in fact discriminate against Zhang. As noted above, however, we are bound by the jury's finding that the corporate defendants did discriminate on the basis of race or ethnicity.

$1 million punitive damage award); *Pavon v. Swift Transp. Co.*, 192 F.3d 902, 909 (9th Cir.1999) (finding that an employer's toleration of racial slurs and termination of an employee who complained of them was sufficiently reprehensible to justify a $300,000 punitive damage award); *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1116 (10th Cir.2001), *cert. denied*, 534 U.S. 1131, 122 S.Ct. 1071, 151 L.Ed.2d 973 (2002) (finding that where two African American women had been suspected of shoplifting and briefly detained on the basis of their race, the store's conduct was sufficiently reprehensible to support the award of $1.1 million in punitive damages). We have no trouble concluding that the corporate defendants' discrimination against Zhang was sufficiently reprehensible to justify a substantial punitive damages award.

2. Ratio of punitive to compensatory damages

"The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *BMW*, 517 U.S. at 580, 116 S.Ct. 1589. This guidepost is generally analyzed by comparing punitive and compensatory damages. *Id.* at 581, 116 S.Ct. 1589.

"In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis." *Id.* at 573, 116 S.Ct. 1589. The Court has refused to give a precise mathematical guideline for the "constitutionally acceptable range," but the two cases in which the Court struck down punitive damages awards both involved rather large ratios of punitive to compensatory

damages: in *BMW*, the ratio was a "breathtaking 500 to 1," *id.*; in *State Farm*, the ratio was 145 to one, __ U.S. at __, 123 S.Ct. at 1524. Likewise, in *Cooper Industries*, where the Court questioned the size of the award but declined to rule on its constitutionality, the ratio was ninety to one. 532 U.S. at 429, 121 S.Ct. 1678.

Despite its refusal to establish a firm numerical limit to the ratio, the *BMW* Court noted that precedent "suggested that the relevant ratio was not more than 10 to 1," 517 U.S. at 559, 116 S.Ct. 1589. In *State Farm*, the Court "decline[d] again to impose a brightline ratio which a punitive damage award cannot exceed," __ U.S. at __, 123 S.Ct. at 1524, but offered similar guidance on the general limits to an acceptable ratio: "[I]n practice, few awards exceeding a single-digit ratio . . . will satisfy due process." *Id.* "Single-digit multipliers are more likely to comport with due process" than the extreme ratios found in *BMW* or *State Farm*. *Id.*

In this case, the ratio of the $2.6 million punitive damage award to the $360,000 compensatory damage award is slightly more than seven to one. This is of course a single-digit ratio, far below the ratios at issue in *BMW*, *Cooper Industries*, and *State Farm*. We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case. The ratio here is not constitutionally excessive.

3. Civil or criminal penalties

"Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." *BMW*, 517 U.S. at 583, 116 S.Ct. 1589. In both *BMW* and *State Farm*, the Court concluded that the maximum fine that could be imposed for the conduct at issue was $10,000. 517 U.S. at 584, 116 S.Ct. 1589. The Court found that the $2 million award in *BMW* was "substantially greater than the statutory fines available," 517 U.S. at 584, 116 S.Ct. 1589, and that the civil fine in *State Farm* was "dwarfed by the $145 million punitive damages award," __ U.S. at __, 123 S.Ct. at 1526.

As we held in *Swinton*, however, "[t]here are no 'civil penalties' for the type of conduct for which [the appellants were] held liable in this case." 270 F.3d at 820. In assessing the punitive damage award at issue in *Swinton*, we noted that Congress had imposed a $300,000 punitive damage cap for violations of Title VII, reasoning that this damage cap represented a legislative judgment similar to the imposition of a civil fine. *Id.* at 820.

The discrepancy between the $10,000 fines and multimillion dollar awards at issue in *BMW* and *State Farm* is far greater than that between the $300,000 Title VII cap and the $2,600,000 award at issue here. In addition, as we underscored in *Swinton*, "Congress has not seen fit to impose any recovery caps in cases under § 1981 . . . , although it has ample opportunity to do so." *Id.* And, as we noted in *Swinton*, that one *BMW* guidepost may indicate that a particular award

raises *BMW*-type concerns does not prove that award to be constitutionally excessive. Thus, as we did in *Swinton*, *see id.*, we hold that, on balance, the punitive damages award here did not violate due process. The conduct of the corporate defendants was highly reprehensible, and the punitive award exceeded the compensatory award only by a single-digit multiplier. Thus, although the punitive damages cap established for an analogous statute, Title VII, is substantially lower than the award here, the discrepancy is not nearly so great as in *BMW* or *State Farm*. Accordingly, we will not disturb the jury's award of punitive damages.[15]

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED in all respects.

AFFIRMED.

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15. The appellants also argued that the punitive damages award demonstrated such passion and prejudice that not only must the award be reduced, but the liability determination must be vacated as well. In light of our conclusion that reduction of the award is not justified, and the fact that the appellants have cited no caselaw suggesting that passion and prejudice may be inferred from a large damages award alone, we decline to address this argument.

APPENDIX B — MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE FILED AND ENTERED NOVEMBER 7, 2001

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C99-1441Z

WEI ZHANG,

Plaintiff,

v.

AMERICAN GEM SEAFOODS, et al.,

Defendants.

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, United States District Judge:

(1) The Court DENIES Defendants' Motion for (1) Judgment as a Matter of Law, and (2) A New Trial or, in the alternative, to Amend the Judgment.

(2) Judgment as a matter of law will only be granted if all the evidence, viewed in the light most favorable to the non-moving party, demonstrates that there is only one proper

decision and it is contrary to that reached by the jury. *Forrett v. Richardson*, 112 F.3d 415, 419 (9th Cir. 1997). A Court may grant a new trial only if the jury's verdict is against the great weight of the evidence or "it is quite clear that the jury has reached a seriously erroneous result." *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1248 (9th. Cir. 1998) (internal citations omitted).

(3) The Court finds that the jury's verdict is not contrary to the evidence presented at trial and that the damages awards are supported by the evidence and not a result of passion or prejudice. Accordingly, the Court DENIES Defendants' Motions, docket no. 268.

(4) The Clerk is directed to send a copy of this Minute Order to all counsel of record.

Filed and entered this 7th day of November, 2001.

BRUCE RIFKIN, Clerk

By s/ Casey Condon
Casey Condon
Deputy Clerk

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON DATED OCTOBER 3, 2001

UNITED STATES DISTRICT COURT
Western District of Washington

CASE NUMBER: C99-1441Z

WEI ZHANG,

v.

AMERICAN GEM SEAFOODS, et al.

JUDGMENT IN A CIVIL CASE
with revisions

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

* * *

IT IS ORDERED AND ADJUDGED

That the Plaintiff Wei Zhang recover judgment:

For intentional discrimination for race and national origin discrimination in violation of federal law, 42 U.S.C. § 1981 et. seq. against Defendant MCMI Food Company and Defendant American Gem Seafoods for the sum of $360,000.00, each being jointly and severally liable for the total amount.

Appendix C

For punitive damages under 42 U.S.C. § 1981 et. seq. against Defendant MCMI Food Company and Defendant American Gem Seafoods for the sum of $2,600,000.00, each being jointly and severally liable for the total amount.

For breach of Plaintiff's written employment contract and failure to pay wages under RCW 49.52 et. seq. against Defendant MCMI Food Company, Defendant American Gem Seafoods, and Defendant Lees for the sum of $86,000.00, each being jointly and severally liable for the total amount.

For wages or benefits willfully withheld from Plaintiff during the period from the date of termination until September 29, 1999 in violation of RCW 49.52 et. seq. against Defendant MCMI Food Company, Defendant American Gem Seafoods, and Defendant Lees for the sum of $86,000.00, each being jointly and severally liable for the total amount.

Plaintiff shall also recover interest at the rate of 2.49 percent as provided by law and his cost of action.

BRUCE RIFKIN, Clerk

By s/ Casey Condon
Casey Condon
Deputy Clerk

October 2, 2001
Date

APPENDIX D — VERDICT FORM OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE DATED AND FILED AUGUST 23, 2001

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C99-1441Z

WEI ZHANG,

Plaintiff,

v.

AMERICAN GEM SEAFOODS, et al.,

Defendants.

VERDICT FORM

WE, THE JURY, make the following answers to the questions submitted by the Court.

Appendix D

Question No. 1

Do you find for plaintiff Wei Zhang with respect to his first claim for hostile work environment based on race or national origin under federal and state law as to the defendants?

Answer

MCMI Food Company/ American Gem Seafoods	Yes ____	No X
Harry Lees	Yes ____	No X

* * *

Question No. 3

Do you find for plaintiff Wei Zhang with respect to his second claim for race and national origin discrimination in violation of federal law as to the defendants?

Answer

MCMI Food Company/ American Gem Seafoods	Yes X	No ____
Harry Lees	Yes ____	No X

Appendix D

Question No. 4

Do you find for plaintiff Wei Zhang with respect to his third claim for race and national origin discrimination in violation of state law as to the defendants?

Answer

MCMI Food Company/ American Gem Seafoods	Yes ____	No X
Harry Lees	Yes ____	No X

Question No. 5

Do you find for plaintiff Wei Zhang with respect to his fourth claim for retaliatory discharge based on federal law as to the defendants?

Answer

MCMI Food Company/ American Gem Seafoods	Yes ____	No X
Harry Lees	Yes ____	No X

Appendix D

Question No. 6

Do you find for plaintiff Wei Zhang with respect to his fifth claim for retaliatory discharge based on state law as to the defendants?

Answer

MCMI Food Company/ American Gem Seafoods	Yes ____	No _X_
Harry Lees	Yes ____	No _X_

If your answer to question 3, 4, 5, or 6 is "yes," answer Question 7.

If your answer to these questions is "no," do not answer Question 7.

Question No. 7

What amount of total damages, if any, do you award Plaintiff on claims 2, 3, 4, or 5? You must apportion the damages you award among the defendants you find responsible.

Answer

TOTAL Amount of Damages $360,000

Appendix D

Apportionment of Total Damages among Defendants

MCMI Food Company/ American Gem Seafoods	$360,000
Harry Lees	$ 0

If you answered "yes" to questions 1, 3 or 5 and find a violation of federal law as to any defendant, answer Question 8 as to that defendant or defendants.

If you answered "no" to questions 1, 3 or 5, proceed to Question 10.

Question No. 8

Was a defendant's conduct malicious or a reckless disregard of plaintiff's rights?

Answer

MCMI Food Company/ American Gem Seafoods	Yes X	No ____

If you answer Question 8 "yes," answer Question 9.

If you answer Question 8 "no," proceed to Question 10.

Appendix D

Question No. 9

What total amount of punitive damages, if any, do you award the Plaintiff?

Answer

MCMI Food Company/ American Gem Seafoods	$2,600,000

Question No. 10

Do you find for plaintiff Wei Zhang with respect to his sixth claim for breach of Plaintiff's written employment contract?

Answer

American Gem Seafoods	Yes X	No ____
Harry Lees	Yes X	No ____

If you answered "yes" to Question 10 as to plaintiff's breach of contract claim, answer r questions 11, 12 and 13.

If you answered "no" to Question 10, date and sign the verdict form.

Appendix D

Question No. 11

What total amount of lost wages or benefits through September 29, 1999, if any, do you award Plaintiff on his sixth claim for Breach of Contract?

Answer

TOTAL Amount of Damages $86,000

If you awarded Plaintiff any lost wages or benefits on his sixth claim for Breach of Contract answer questions 12 and 13.

Question No. 12

Do you find that any wages or benefits were wilfully withheld with intent to deprive plaintiff of wages or benefits required by the contract?

Answer

American Gem Seafoods	Yes X	No ____
Harry Lees	Yes X	No ____

If you answered Question 12 "yes" as to any defendant, please answer Question 13.

If you answered Question 12 "no," date and sign the verdict form.

Appendix D

Question No. 13

What amount of wages or benefits were wilfully withheld during the period from the date of termination until September 29, 1999?

Answer $87,500

DATED: 23 August 2001 **PRESIDING JUROR:** s/ [illegible]

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 22, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-36130

WEI ZHANG,

Plaintiff - Appellee,

v.

AMERICAN GEM SEAFOODS,
a Texas corporation, et al.,

Defendants - Appellants.

D.C. No. CV-99-01441-TSZ
Western District of Washington,
Seattle

ORDER

Before: D.W. NELSON, THOMAS, Circuit Judges, and Pregerson, District Judge.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judge Thomas voted to deny the petition for rehearing en banc. Judges Nelson and Pregerson recommended denial of the petition for rehearing en banc.

Appendix E

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing and the petition for rehearing en banc are DENIED.

Supreme Court, U.S.
FILED
FEB 2 - 2004
OFFICE OF THE CLERK

No. 03-944

In The Supreme Court of the United States

AMERICAN GEM SEAFOODS, INC., and MCMI FOOD COMPANY, INC.,

Petitioners,

v.

WEI ZHANG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

SCOTT BLANKENSHIP*
THE BLANKENSHIP LAW FIRM, P.S.
1201 Third Avenue, 28th Floor
Seattle, WA 98101
(206) 343-2700

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Counsel for Respondent
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

Petitioners' writ should be denied. Procedurally, there are many layers of waiver insulating the substantive issues from review, a fact that Appellants fail to even address. Substantively, petitioner's issues completely lack merit. Plaintiff, Mr. Wei Zhang ("Zhang") was an exemplary employee, devoted loyally and tirelessly to his employer. Despite his accolades, he had to endure discrimination from the moment his company was purchased by Defendants in 1997. Petitioners' behavior was reprehensible causing Zhang great anguish and shame while it occurred during his employment. He was still experiencing this shame and emotional distress two years after his termination at trial, August 2001.

A. Discrimination Against Zhang

Zhang was formerly a dean and professor of business at Northeastern University in Dalian, China. He came to the United States due to the political crackdown following the Tiananmen Square massacre. After finishing his MBA at Delaware State University, he began working in the seafood industry. Petition for Writ of Certiorari Appendix ("Pet. App."), 2a; 339 F.3d at 1024.

Zhang became an executive at Sea-Rich Seafoods, acquired by American Gem Seafoods. Mr. Zhang quickly climbed the corporate ladder, and became one of the key executives in the company running a division called Pacific Gem. (Pet. App. 3a); 339 F.3d at 1025.

Zhang was an exemplary employee. Virtually everyone who worked with Zhang was impressed by his work ethic and dedication to the company. Zhang was an

extremely hard worker. Supp. ER ("S.ER") 45. He was the portal to China and generated approximately 30 percent of overall business. S.ER 44:2-22.

According to former American Gem President Mullin, Zhang worked harder than anyone else in the company. S.ER 83:17-84:5. Because his responsibility covered time zones from China to the east coast of the United States, Zhang often worked from 6:30 a.m. until midnight. S.ER 147:16-23. According to former American Gem President Reitzer, Zhang "was one of the most tireless, hard-working, sincere, loyal employees I've ever had working for me." S.ER 6:16-25. Another executive testified that Zhang's work was excellent, and that he was very dedicated to his job. S.ER 56:17-25.

Zhang had higher gross sales in 1998 (the last full year he worked before he was fired February 1999) than any other employee at American Gem. S.ER 209:13-213:16; 255:11-14. Zhang's division, Pacific Gem, was the only profitable division in the company.[1] Zhang saved the company from substantial losses by selling approximately 3500 metric tons of herring to end-users throughout China at a time when the market had collapsed. S.ER 88:1-93:6. According to Mullin, "[i]t's one of the most accomplished feats of anybody I know." S.ER 89:19-21.

Zhang's career took a turn for the worse, immediately after MCMI Food Company of San Antonio, Texas bought SeaRich Seafoods, in 1997 renaming it American Gem

[1] S.ER 15:8-10; 49:17-20; 85:8-22; 216:11-217:16; Ex. 51, S.ER 329; Ex. 77, S.ER 336-337.

Seafoods.[2] Zhang was immediately subjected to racial discrimination. From the start, the new ownership offered Zhang a lower salary than similarly situated Caucasian employees with similar titles and duties even though the division he ran was key to the acquisition.[3] He was kept out of important management meetings in which he had previously participated. His vendors were always the last to be paid. The discrimination escalated after the parent company later hired a new CEO, Harry Lees in December 1997.(Pet. App. 3a); 339 F.3d at 1025.

Lees made numerous discriminatory comments against Mr. Zhang, expressing distrust in Mr. Zhang because he was Chinese and Asian. Witnesses testified to these and other discriminatory comments at trial, including key testimony from former executives of American Gem. (Pet. App. 3a, 4a); 339 F.3d at 1025.

In November 1998, a new management team was hired. This new team began discriminating against Zhang by sidelining him, changing his reporting structure, excluding him from meetings, demoting him, and reducing his responsibilities and title. He had previously been in charge of all Asia operations, but his new business card reflected a reduction of his responsibilities to only China. (Pet. App. 3a); 339 F.3d at 1025. Eventually, they

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[2] Shortly before trial, the assets of American Gem were sold, but the liabilities were not. At the time of trial, American Gem was just a shell corporation, "all paper and no function." The assets were sold to WorldCatch for $4 million, whose CEO is Jim Hilger, former president and CFO of American Gem. S.ER 121:7-126:18; 127:23-25; S.ER 127:16-586:7; S.ER 129:9-588:12.

[3] S.ER 5:3-19; 7:1-21;11:22-14:1.

appointed a less qualified Caucasian executive to take over Zhang's duties and position.[4]

Zhang was also denied a $25,000 bonus he was entitled to under his contract for 1998. Petitioners' justification for this denial was that although the Pacific Gem division was profitable, American Gem, as a whole, was not. Zhang's Caucasian replacement Jim Bugbee, however, received a bonus for 1999 even though American Gem was not profitable that year either. (Pet. App. 5a); 339 F.3d at 1025.

American Gem omitted Zhang from industry publications that listed vice presidents and managers of American Gem. His Caucasian replacement, Bugbee, was listed as having Zhang's title, Vice President of Asian Procurement. The publication stated that management had been completely replaced, and Zhang testified that many of his suppliers were confused and called him to see whether he was still with the company; this created great anxiety for him. Chinese employee Parker Gao testified that Zhang was generally treated worse that American Gem's Caucasian employees. (Pet. App. 4a); 339 F.3d at 1025.

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[4] Bugbee, a Caucasian, lacked Zhang's qualifications. Bugbee had been to China only four times in his career, and did not speak Chinese. S.ER 28:17-24. Bugbee could not get as favorable terms from the Chinese vendors as Zhang. S.ER 162:12-163:3. Bugbee had significantly less education and less experience trading with Asia and China than Zhang. S.ER 181:1-19. The day after Zhang was fired, Bugbee assumed Zhang's former title, Vice President of Asian Procurement, and assumed his responsibilities including purchasing in China. Ex. 53, para. 2, ER 41; S.ER 162:12-14; 40:23-41:2; 26:7-16; 303:1-4. (Pet. App. 7a); 339 F.3d at 1026.

Mr. Zhang was publicly fired and humiliated. The newly appointed President and CFO personally went to the Boston Airport to fire Mr. Zhang loudly and publicly on February 24, 1999. President Parker refused to give Zhang a reason for firing him. CFO Hilger testified that he was instructed not to discuss anything. S.ER 264:23-266:6. (Pet. App. 5a); 339 F.3d at 1026.

Zhang was not allowed to resign. Bent on crushing Zhang's psyche, his benefits were immediately cancelled. His company car was immediately confiscated, and they held his personal effects, including family photos, and reference books for several weeks. S.ER 151:7-17. (Pet. App. 6a); 339 F.3d at 1026. He was denied any pay, which violated his employment contract.[5] He was denied severance pay. "Bugbee came to the company's Seattle office and confiscated the keys of American Gem employees Parker Gao and Stacy Li, who are Chinese." (Pet. App. 7a); 339 F.3d at 1026. Zhang was further denied the reasons for his termination for nearly two months.[6]

The very next day after firing him, all of Zhang's business contacts in the United States and abroad were immediately notified of his termination. President Parker and Zhang's replacement, Vice President Jim Bugbee, sent out two letters marked "urgent", one in English and the

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[5] It is uncontested that the jury found that each Defendant breached Mr. Zhang's employment contract, which entitled him to pay through the end of his contract, a time period that extended well beyond his termination in February.

[6] S.ER 74:8-25; 75:4-13; Trial Exhibit 16, ER 44. The reasons for termination were proven false at trial.

other in Chinese to Zhang's vendors and business contacts. Ex. 53, ER 41. The letter contained false information. S.ER 62:1-22. The letter explained that Zhang's employment had been terminated. The letters poisoned Zhang's future in the industry, causing Zhang great embarrassment, hurting his reputation and future business. The Chinese translation made him look like a criminal. S.ER 156:22-157:1. (Pet. App. 6a); 339 F.3d at 1026.

Defendants had not terminated Caucasians with such passion or prejudice, even when they had proof of criminal conduct. For example, two white executives were allegedly stealing from the company, and another exposed himself to his coworkers. These Caucasian employees were not fired immediately or publicly, and were allowed to resign. Even with these serious and criminal allegations, the white executives received extended benefits, generous severance packages, an extension of pay, and use of a company car, one as long as six weeks after termination. (Pet. App. 6a-7a); 339 F.3d at 1026.

Defendants' reasons for firing Zhang were proven untrue at trial.[7] The jury heard additional evidence of

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[7] The Appellate Court wrote: "In February 1999, Zhang took a trip to Iceland along with two former American Gem employees. They met with people at Atlantic Coast Fisheries, and Zhang handed out his Pacific Gem business card. Zhang told the company that he was taking a personal vacation with his father – his first vacation since starting work at SeaRich Seafoods – and used his vacation time for the trip. Upon his return from Iceland on February 24, 1999, he was met by Parker and Hilger as he exited Customs at Boston's Logan Airport, and they told him in a loud voice that he was terminated. When he asked why, they told him that he could go back to Seattle to find out. No one asked him why he had gone to Iceland. Cynthia Diaz, an attorney who worked for MCMI's parent company, told Zhang that he was fired for

(Continued on following page)

lying and mendacity by Defendants.[8]

B. Zhang Suffered Significant Emotional Distress.

Zhang considered employment at American Gem to be a lifetime commitment, and his loyalty to the company was complete. S.ER 155:10-19. Throughout his employment (*see supra section A*), Zhang struggled with discrimination by his employer but had no avenue to complain; the company lacked any policies or complaint procedures regarding discrimination.[9]

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going to Iceland with competitors. At trial, however, Lees testified that, at the time Zhang was terminated, no one knew why he had made the trip. Several months after he was terminated, and after repeatedly requesting an explanation, Zhang received a letter from Diaz stating that in addition to the Iceland trip, he was terminated because he violated a directive against extending credit, refused to provide documentation of transactions in China, and was insubordinate to Lees. None of these accusations was substantiated at trial."

[8] The misrepresentations the jury heard included the following: General Counsel Cynthia Diaz declared under oath that she had personal knowledge of the events surrounding the termination of Zhang. Diaz in court was forced to admit that she had no such personal knowledge, and her representation to the Court was false. S.ER 76:3-80:15. The Court (outside the jury's presence) found that Diaz had filed "a false affidavit in this court on a material issue of fact." S.ER 80a:8-35. Additionally, in support of a motion to dismiss on jurisdictional grounds, CEO Lees submitted a false affidavit swearing that he "only visited the State of Washington twice on business that did not involve Mr. Zhang." S.ER 114:9-118:4; Ex. 23, numbered paragraph 4, S.ER 322. Lees later admitted in open court that this declaration was false. S.ER 117:4-10; S.ER 119:19-120:25.

[9] Defendants failed to provide Zhang with "any antidiscrimination policy literature or training while he worked at American Gem and was not informed about how to make a discrimination complaint." Pet. App. 11a); 339 F.3d at 1028.

Zhang was further humiliated by his public termination at Logan Airport. S.ER 107:24-108:17. As Mullin witnessed and testified: "I came out, and I saw Wei first. [H]is eyes were as big as half dollars, and he was in shock." . . . He was very . . . distraught. He was upset. He was in shock. He was confused. . . . he didn't understand what happened." S.ER 101:2-23.

Defendants magnified Zhang's public humiliation by further shaming him publicly to all of his business contacts and vendors. Only one day after Zhang was publicly terminated at the airport, Vice President Parker and his replacement, Jim Bugbee, sent an "urgent" letter informing all of Zhang's contacts that he had been terminated from employment. Ex. 53, ER 41. The letter contained false information. S.ER 62:1-22. The letter was sent in an English language version as well as in a Chinese "translation." S.ER 164:2-24. The Chinese translation made Zhang appear to be "either criminal or something very bad." (Pet. App. 38a) 339 F.3d 1040. S.ER 156:10-158:21.

Zhang testified that the letter sent by the company to his Chinese suppliers, particularly those in his hometown, informing them of his termination, humiliated him. He further testified that his reputation and credibility were considerably damaged, and the letter severely and negatively affected his ability to do business with China in the future. S.ER 156:10-158:21.

He also struggled emotionally with having to explain to potential employers, and his parents, that he had been fired; he was unable to find an equivalent job. S.ER 196:18-198:11. Zhang felt a deep sense of guilt because the Chinese employees in Dalian lost their jobs as a consequence of his firing. He also suffered from nightmares. He

still struggles to forget the "nightmare." "It really hurt my heart," Zhang testified and stated that even today, "it's gut-wrenching torture." S.ER 214:6-25.[10]

PROCEEDINGS IN THE DISTRICT COURT

This case was tried before the Honorable Judge Thomas Zilly in the Western District of Washington. Defendants made a motion for a judgment as a matter of law ("JMOL") after Plaintiff rested but before the close of all the evidence. Supp. ER 223:19-224:8. In that motion, Defendants made absolutely no mention of emotional

[10] The trial judge was in the best position to review the record for emotional distress. The trial judge witnessed Zhang break down in tears while reading a document on the stand. Trial Transcript: 696:16-697:10, in pertinent part:

> Q (By Mr. Blankenship) I want to direct you to – have you turn the page to the second page. And if you could read the highlighted portion.
>
> A . . . Sometimes I was crying quietly at home, because we American Gem Group should be a very good company with good profit and reputation. Excuse me. I spent all my energy in building our reputation, and is it the lord decision that let us down?
>
> Q I have one more – you want to gather your composure. Mr. Zhang? You okay to go on?
>
> A Yes. –
>
> THE COURT: Just a moment. There is no question before you.
>
> Q (BY MR. BLANKENSHIP) Could you –
>
> THE COURT: Do you want a further portion read?
>
> MR. BLANKENSHIP: Yes.
>
> THE COURT: Why don't you read it.

distress damages, failing to make any challenge to the sufficiency of the evidence regarding emotional distress damages. S.ER 225:3-19. The Court denied Defendants' motion. S.ER 228:10-12. Defendants failed to move or renew its JMOL motion at the close of the evidence; renewing such a motion is a prerequisite for preserving a challenge to the sufficiency of the evidence after an adverse jury verdict.

When objecting to jury instructions, Defendants did not even suggest that the Court's jury instructions for emotional distress damages were objectionable. Defendants further failed to make any objection to the Court instructing the jury on punitive damages.[11]

On August 23, 2001, the jury returned a unanimous verdict for Plaintiff on federal discrimination claims against the corporate defendants awarding compensatory damages of $360,000. The jury awarded punitive damages of $2,600,000. The jury returned a verdict against all Defendants on breach of contract and willful withholding of wages, awarding $86,000 and $87,500 respectively. Lees was not found individually liable for discrimination.[12]

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[11] S.ER 291:3-293:19; 276:1-302:8; 289:19-290:6; 290:10-291:2; ER 92-96.339 "[T]he record does not reflect that the corporate defendants objected to instructions allowing the jury to award punitive damages nor did they make any objection to the sufficiency of the evidence for a punitive damages award at the close of the evidence." (Pet. App. 40a); F.3d at 1041-1042.

[12] The verdicts merely required that the jury assign liability on those causes of action without any finding of fact. Thus, Lees was never "exonerated" as Defendants contend. The jury simply failed to hold him individually liable for discrimination; no other conclusions can be drawn from that general verdict without resorting to speculation.

Thereafter, Defendants brought a motion for JMOL and new trial, which was denied. ER 147-162; 163-164, Court's Order.

PROCEEDINGS IN THE APPELLATE COURT

The appellate court found that appellants had waived any arguments regarding the sufficiency of the evidence because the issue was not raised before the close of all of the evidence, under Fed. R. Civ. P. 50(b). (Pet. App. 20a); 339 F.3d at 1034. The appellate court found that all of the compensatory and punitive damages awards were justified and agreed with the trial court. 339 F.3d at 1040-1014. The Court concluded that the jury's discrimination verdict against the corporate defendants was not inconsistent with not finding Lees personally liable for discrimination.[13]

REASONS FOR DENYING THE WRIT

I. Petitioners Did Not Adequately Present or Preserve in the Courts Below Their Challenge to the Constitutionality of the Punitive Damage Award

The first question presented rests on petitioners' objection that the court of appeals assertedly did not discuss in adequate detail petitioners' objection to the size of the punitive damage award. The court of appeals'

[13] (Pet. App. 20a); 339 F.3d at 1032, n.5. "The facts set out above include several lines of evidence apart from Lees's actions suggesting that Zhang was fired due to his race or national origin."

opinion, petitioners complain, was not sufficiently "detailed", "meaningful" or "exacting." (Pet. i, 10, 11).

The Ninth Circuit's evaluation of the constitutionality of the award amply meets the standards established by this Court's decisions. Although it is not necessary, the lack of more detailed judicial analysis is entirely the fault of petitioners' appellate counsel.[14] The discussion of this constitutional issue in petitioners' opening brief in the court of appeals is, at best, only five sentences. Almost all of the discussion in petitioners' reply brief in the court of appeals was an attempt to defend the paucity of argument in that opening brief; the argument in the reply brief is headed "Appellants Preserved Their Challenges to the . . . Punitive Damage Awards." The appellate court cannot be faulted for failing to discuss in detail constitutional arguments that petitioners simply did not make. We set forth in an appendix to this brief the full text of the inexplicably truncated argument presented to the court of appeals. *See* Appendices A, B.

The only specific contention advanced by petitioners in the court below was that their conduct was not the least reprehensible because they had not engaged in any intentional discrimination at all.[15] The court of appeals properly

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[14] Defendants' trial lawyers, and the lawyers who wrote the appellate brief and reply, are different than the Defense lawyers before this Court in this petition.

[15] Opening Brief of Appellants, No. 00-35604, pp. 46-47 ("There was nothing reprehensible about Parker and Hilger's decision to terminate Zhang, in light of Zhang's conduct. The laws prohibiting discrimination do not require that an employer tolerate such conduct, nor offer those who are racial minorities greater protection where, as here, the employer has a good faith belief that an employee has acted disloyally

(Continued on following page)

rejected that argument because it was inconsistent with the jury's finding of intentional discrimination.

> [T]he appellants' argument seems to depend on the position that the corporate defendants did not in fact discriminate against Zhang. As noted above, however, we are bound by the jury's finding that the corporate defendants did discriminate on the basis of race or ethnicity.

(Pet. App. 44a); 339 F.3d at 1043 n.14.

In this Court, petitioners have expressly relinquished any challenge to the jury's finding of discrimination. "While Petitioners vigorously disagree, they realize they are bound by the ruling below that they did discriminate." ((Pet.) p. 4 n.2). Thus petitioners have now abandoned the only specific argument that they made in the court of appeals.

In their petition, the defendants, for the first time advance a host of specific arguments that were never presented to the court of appeals. For example, *BMW of North America v. Gore*, 517 U.S. 559, 576-79 (1996), sets forth five factors relevant to an assessment of the reprehensibility of conduct. The analysis is not new, as the list

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and in breach of his fiduciary responsibilities."); Reply Brief of Appellants', No. 00-35604, pp. 22-23 ("Appellants rely solely on the first [*Cooper Industries*] factor, that is, the disproportionality of the amount of the award to the degree of reprehensibility of the defendants' conduct. . . . Appellants' constitutional challenge to the amount of punitive damages is a simple one: Setting aside the evidence that Zhang presented against Lees (in light of the jury's determination that Lees did not discriminate), the remaining evidence is that Parker and Hilger terminated Zhang's employment because of his lies about his trip to Iceland.")

is merely repeated in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513, 1521 (2003). Petitioners object that "[t]hese factors do not appear in the Ninth Circuit's opinion." (Pet. 11). But that assuredly is because those five factors also do not appear in petitioners' court of appeals briefs.

Petitioners object that the court of appeals did not "discuss" the comment in *Campbell*, based on this Court's earlier decision in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 199 (1991), that a ratio of four to one might be close to the line of constitutional infirmity. (Pet. 8). Petitioners' own briefs in the court below, however, did not discuss that argument either. Petitioners fault the court below for "*limiting* its proportionality analysis to the observation that single digit multipliers generally are constitutional." (Pet. i) (*emphasis added*). But in petitioners' court of appeals briefs the discussion of such proportionality ratios was not "limit[ed]"; it was completely nonexistent.

The Ninth Circuit does not hold, as petitioners suggest, that "no assessment of specific conduct is required in a case where the plaintiff establishes liability for racial discrimination." (Pet. 12). There is no such detailed assessment in the Ninth Circuit's discussion of punitive damages because petitioners' themselves chose merely to insist that no discrimination had ever occurred, rather than present any substantive analysis; petitioners simply did not advance any contention that the particular types of discriminatory actions asserted by the plaintiff were insufficient to support the size of the punitive award. The court below did describe elsewhere in its opinion the particularly noxious discriminatory acts in this case. (Pet. App. 38a); 339 F.3d at 1040. The Ninth Circuit cannot be

faulted for failing to reiterate that list of those discriminatory practices, because petitioners' constitutional argument rested solely on a denial that any discrimination had ever occurred. The appellate court's description of the extraordinarily reprehensible practices in this case is throughout the opinion. *See e.g.,* (Pet. App. 3a-7a, 38a). The appellate court cannot be faulted for failing to repeat the same specific facts when analyzing reprehensibility.

Under these circumstances, petitioners waived in the court below all of the arguments that they are making for the first time in this Court. Petitioners may indeed have a grievance with the attorneys who represented them in the court of appeals, but they assuredly have no legitimate grievance with the court of appeals itself.

II. This Case Does Not Present A Certworthy Issue Regarding The Amount of the Punitive Damage Award

The petition advances only a fact-bound argument about whether the court below correctly applied this Court's constitutional standards regarding punitive damages.[16] The opinion below presents, petitioners urge, a

[16] The petitioners are essentially arguing for a bright numerical line to be drawn completely abrogating the providence of the court. (Pet. 13). The test is whether the ratio between compensatory and punitive damages is so extreme that it is a violation of a party's due process rights. Here, the appellate court underwent a detailed analysis of precedent finding "single-digit multipliers are more likely to comport with due process" contrasting the ratio in this case and others with the "extreme ratios in *BMW* or *State Farm*." (Pet. App. 45a, 46a). *State Farm* itself recognized that "there are no rigid benchmarks that a punitive damages award may not surpass." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 123 S. Ct. 1513, 1524 (2003) (noting that the 4 to 1

(Continued on following page)

"facially accurate recitation but erroneous application of this Court's precedents." (Pet. 10; see *id.* (Ninth Circuit's opinion "mentioned" *Campbell's* standards.)). Petitioners do not suggest that the decision below raises any major new legal issue not resolved by this Court's past precedents; they urge only that the court of appeals erred in applying those established standards to the particular facts of this case.

This Court does not grant review to reconsider such fact-bound determinations by the lower courts. "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. Rule 10.

The petition in this case stops short of even asserting that the court of appeals necessarily arrived at the wrong result when it affirmed the punitive damage award. Rather, petitioners fault the court below largely for having failed to discuss in more detail constitutional arguments which petitioners themselves failed to advance in that court. That is not an appropriate basis for criticizing the court below, and it assuredly provides no basis for granting a writ of certiorari.

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ratio was well within the "single digit" ratio discussed by the Court). *See Matthias v. Accor Econ. Lodging, Inc.*, 2003 U.S. App. LEXIS 21299 (7th Cir. 2003) (holding that State Farm did not establish a bright line rule, and affirming punitive damages in a ratio of 37.2 to 1).

III. Petitioners Did Not Adequately Preserve In The District Court Any Objection To The Sufficiency of the Evidence Regarding Compensatory Damages

As the court of appeals correctly noted, petitioners waived in the district court any argument that the jury verdict was not supported by substantial evidence. (Pet. App. 20a); 339 F.3d at 1033. Rule 50(b) provides that a trial court can consider a post-verdict motion for judgment as a matter of law only if the moving party first filed such a motion "at the close of all evidence." Fed. R. Civ. P. 50(b). In the instant case, although petitioners filed a motion for judgment as a matter of law after the close of the plaintiff's evidence[17], they inexcusably failed to file such a motion "at the close of all evidence" as required by the Federal Rules of Civil Procedure. The petition does not challenge the decision of the court of appeals that any arguments about the sufficiency of the evidence were thus waived.

Petitioners also failed to preserve the issue when they chose not to object to the relevant jury instruction, as they should have under Rule 51. The instruction regarding emotional distress permitted the jury to make an award for such injuries without any requirement that any particular type of evidence be present. That instruction stated in pertinent part:

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[17] Even that motion advanced no argument whatever regarding the sufficiency of the evidence of emotional distress.

> If you find for the plaintiff . . . your verdict may include the following items of damage if caused by a defendant. . . .
>
> Three. The emotional harm to the plaintiff caused by the defendants, including emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety and/or anguish experienced in such emotional harm that with reasonable probability will be experienced in the future by the plaintiff. . . .
>
> Your award must be based upon evidence, not upon speculation, guess or conjecture.
>
> *The law has not furnished us with any fixed standard by which to measure pain and suffering. With respect to these matters, you must be governed by your own judgment, by the evidence in the case and by these instructions.*

(Tr. 1294-96) (Emphasis added). "No party may assign as error the giving . . . [of] an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Rule 51, Fed. R. Civ. P.

Because of these waivers, any objection to the jury's award of compensatory damages was limited to petitioners' motion for a new trial. The district court denied that motion. A trial judge's denial of a new trial motion can only be overturned on appeal for a clear abuse of discretion.[18]

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[18] A vast majority of the circuits uniformly hold that the denial of motion for a new trial under Fed. R. Civ. P. 59(a) is reviewed with great deference to the district court's ruling and will not be reversed in the

(Continued on following page)

The court of appeals properly concluded that the trial court's denial of the new trial motion in this case was not an abuse of discretion. (Pet. App. 39a); 339 F.3d at 1040. The certiorari petition does not contend that the court of appeals erred in affirming that exercise of discretion.

Under these circumstances it is difficult to see how petitioners can raise in this Court any argument regarding the type of evidence required to support a compensatory award for emotional distress. Petitioners are barred by Rule 50(b) from arguing that the evidence relied on by Zhang was insufficient as a matter of law to support that monetary award. Petitioners are barred by Rule 51 from arguing that the trial court erred in giving an instruction which lacked any such special evidentiary requirement. And petitioners do not argue that the denial of their new trial motion was an abuse of discretion.

IV. This Case Does Present Any Inter-Circuit Conflict Regarding The Type of Evidence Needed to Support An Award of Damages for Emotional Distress

The circuit split of which petitioners complain is more semantic than real.

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absence of a clear abuse of discretion. *Belk v. City of Eldon*, 228 F.3d 872, 878 (8th Cir. 2000); *EEOC v. Bd. of Regents of the Univ. of Wis. Sys.*, 288 F.3d 296, 304 (7th Cir. 2002); *Whitehead v. Food Max, Inc.*, 163 F.3d 265, 270 (5th Cir. 1998); *Ahern v. Scholz*, 85 F.3d 774, 780 (1st Cir. 1996); *Bristol Steel & Iron Works v. Bethlehem Steel Corp.*, 41 F.3d 182, 186 (4th Cir. 1994); *United States v. Draper*, 762 F.2d 81 (10th Cir. 1985); *Wolff v. Allstate Life Ins. Co.*, 985 F.2d 1524, 1528 (11th Cir. 1993); *Hygh v. Jacobs*, 961 F.2d 359, 365 (2nd Cir. 1992).

Petitioners note, first, that several circuits hold that an award of damages for emotional distress cannot be based solely on conclusory testimony. (Pet. 16-17). There is an inter-circuit conflict, petitioners contend, because "only the Eleventh Circuit joins the Ninth in ruling that a plaintiff's conclusory testimony by itself is sufficient to support emotional distress damages." (Pet. 17). But the decision in this case contains no such holding that conclusory evidence is sufficient; petitioners point to no passage in the opinion, which they assert, contains any such rule.[19]

Petitioners do not even assert that the evidence in this case consisted only of conclusory testimony by the plaintiff. Petitioners attack as insufficient "Zhang's testimony that he was 'greatly hurt and humiliated by his termination and the manner in which it was carried out.' . . . (App. 38a)." (Pet. 16). This passage might lead the reader to believe that the sole testimony offered by Zhang was the sixteen words in the interior quote. In fact, however, that is not a quotation of Zhang's testimony at all; it is a quotation from the court of appeals' summary of what the

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[19] Nor is there any such approval of conclusory testimony in the Eleventh Circuit decision noted by petitioners. *Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003), *certiorari dismissed*, 2004 WL ___. In that case the plaintiff

> Librarians testified the race-based transfers effectively destroyed their careers, and some testified the transfers caused them to resign or go on worker's compensation. When describing their emotional harm, the Librarians testified the transfers "upset," "embarrassed," "Humiliated," and "ashamed" them. Some Librarians testified the transfer caused them to become depressed and one even became suicidal.

332 F.3d at 1358-59.

jury might reasonably have concluded from the evidence. Zhang himself offered detailed testimony about the origin and nature of the emotional distress caused by the proven discrimination.[20]

Petitioners appear to assert, in the alternative, that there is an inter-circuit conflict because the court of appeals upheld the emotional distress award even though Zhang offered neither "expert testimony nor any testimony from a health professional substantiating the extent of his emotional harm or attesting to its cause." (Pet. 6). The Ninth and Eleventh circuits are unique, petitioners imply, in permitting such awards to plaintiffs where there is "no evidence of emotional distress other than their own testimony." (Pet. 17). But petitioners do not identify any circuit that requires that a plaintiff must offer as well testimony from an expert or mental health professional. Even the Fourth Circuit, which requires what it characterizes as "objective evidence", has held that "a plaintiff's testimony, standing alone, may support a claim of emotional distress." *Price v. City of Charlotte, North Carolina*, 93 F.3d 1241, 1251, 1254-57 (4th Cir. 1996).

The Fourth Circuit does use the phrase "demonstrable, genuine, and adequately explained" to describe the type of evidence needed to support an award of damages for emotional distress. *Price*, 93 F.3d at 1251. The Ninth Circuit does not utilize this formulation. (Pet. App. 37a); 339 F.3d 1040. But this distinction appears to be merely semantic. There is no indication that the distinction regarding utilization of that particular phrase betokens

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[20] See *infra*, sections A and B.

any actual substantive difference in the type of evidence required in these two circuits.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SCOTT BLANKENSHIP*
THE BLANKENSHIP LAW FIRM, P.S.
1201 Third Avenue, 28th Floor
Seattle, WA 98101
(206) 343-2700

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Counsel for Respondent

**Counsel of Record*

APPENDIX A

(Appellants' Opening Brief on Constitutionality of the Amount of Punitive Damages)
Opening Brief p. 18;
Opening Brief pp. 46-47.

"And the punitive damages award was grossly excessive in relation to any evidence in the record of reprehensible conduct on the part of the corporate defendants, and there for constitutes a 'grossly excessive' punishment in violation of the Due Process Clause." *Opening Brief p. 18.*

"The jury's award of punitive damages must be rational in order to avoid a violation of constitutional principles of substantive due process. *Cooper v. Leatherman Tool Group, Inc.* 532 U.S. 424. Specifically, *Cooper Industries* hold the Due Process Clause prohibits imposition of 'grossly excessive' punishments on tortfeasors, and, with particular significance here, the determination of excessiveness depends on the reprehensibility of a defendant's conduct. *Cooper Industries,* 532 U.S. at 434. There was nothing reprehensible about Parker and Hilger's decision to terminate Zhang, in light of Zhang's conduct. The laws prohibiting discrimination do not tolerate such conduct, nor offer those who are racial minorities greater protection where, as here, the employer has a good faith belief that an employee has acted disloyally and in breach of fiduciary responsibilities." *Opening Brief pp. 46-47.*

APPENDIX B

(Appellants in Reply on Constitutionality of the Amount of Punitive Damages)
Appellants Reply Brief, 21-23:

"F. Appellants Preserved their Challenges to the Compensatory and Punitive Damage Awards.

Appellants' challenges to the sufficiency of the evidence to support the compensatory and punitive damages awards were preserved by Appellants' motion for JMOL, as discussed above. In addition, Appellants' constitutional challenge to the *amount* of the punitive damages award could not be raised until after the jury's verdict made known the amount of the award and the jury's rejection of the claim of discrimination against Lees. As such, Appellants' appropriately preserved that issue for appeal by raising it in for the first time in their post-trial motion.

. . .

The punitive damages award lacks a sufficient evidentiary basis for the same reasons that the discrimination verdict does: In light of the jury's ruling that Lees was not guilty of discrimination, there is no evidence in the record of intentional unlawful discrimination by any corporate representative. The punitive damages award should also be reversed because it is tainted by the trial court's erroneous exclusion of evidence of Appellants' anti-discrimination policy

. . .

Zhang claims that Appellants have waived their constitutional challenge to the *amount* of the punitive damages award by not having "sufficiently" briefing it. The authority Zhang cites, however, holds only that a *complete failure* to raise an argument in an opening appellate brief waives the issue. Appellants

> specifically challenged, in their opening brief, the proportionality of the punitive damages to the reprehensibility of Appellants' conduct, citing the standards set out in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434 (2001). Appellants have appropriately raised the issue before this Court.
>
> Zhang also quibbles with Appellants' not having brief (sic) all three factors discussed in *Cooper Industries* (and its predecessor, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)) that may be considered in a challenge to the amount of punitive damages. There is no requirement, however, for Appellants to rely on all three factors. Appellants rely solely on the first factor, that is, the disproportionality of the amount of the award to the degree of reprehensibility of the defendants' conduct. The Supreme Court has described this factor as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award. . . . " *BMW*, 517 U.S. at 575. And indeed, the *BMW* court held this factor warranted reducing a punitive damages award *before* the court went on to consider the other two factors. *Id.* at 580
>
> . . .

Appellants' constitutional challenge to the amount of punitive damages is a simple one: Setting aside the evidence that Zhang presented against Lees (in light of the jury's determination that Lees did not discriminate), the remaining evidence is that Parker and Hilger terminated Zhang's employment because of his lies about his trip to Iceland. On *de novo* review, as required by *Cooper Industries,* the punitive damages award of $2.6 million is simply not reasonable in relation to any alleged reprehensibility of this conduct, and must be reversed."

---

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No. 03-944

IN THE

Supreme Court of the United States

AMERICAN GEM SEAFOODS, INC.
and MCMI FOOD COMPANY, INC.,

Petitioners,

v.

WEI ZHANG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

JANET HUGIE SMITH
FREDERICK R. THALER
RAY QUINNEY & NEBEKER
36 South State Street
Suite 1400
Salt Lake City, UT 84111
(801) 532-1500

WILLIAM A. NORRIS
REX S. HEINKE*
JONATHAN GOTTLIEB
AKIN GUMP STRAUSS
HAUER & FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

* *Counsel of Record*

Attorneys for Petitioners

185812

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

Punitive Damages

Respondent Wei Zhang opposes Petitioners' constitutional challenge to the punitive damage award primarily on waiver grounds. Although Respondent does not mention it, the Ninth Circuit correctly ruled, relying on this Court's decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001)), that Petitioner's challenge was not waived. The Ninth Circuit then recognized its duty to undertake *de-novo* review of the constitutionality of the size of the award, but failed to undertake the exacting review required by *State Farm Mutual Automobile Insurance Company v. Campbell*, 123 S. Ct. 1513 (2003). Instead, the Ninth Circuit ignored this Court's commands in *Campbell.*

Emotional Distress Damages

Respondent also asserts that Petitioners failed to preserve any objection to the sufficiency of the evidence supporting the emotional distress damage award. This also is incorrect. The issue was not waived; rather, it was preserved, briefed by both parties, further briefed by both parties at the request of the Ninth Circuit, and then addressed on its merits by the Ninth Circuit. Moreover, as Respondent concedes, Petitioners raised the issue of excessiveness of the emotional distress damages in their post-trial motion for a new trial, and the Ninth Circuit reviewed the district court's denial of that motion for abuse of discretion. A district court necessarily abuses its discretion if it applies an erroneous legal standard, and that is what Petitioner contends happened here.

In any event, Petitioners were not required to raise this point until they petitioned for *en banc* review because the Ninth Circuit had previously rejected their argument in an earlier case. Only an *en banc* court could overrule that precedent. Petitioners raised the issue in their petition for rehearing *en banc*, which was denied. That was all they needed to do.

Review will allow this Court to resolve the deepening circuit split on the proper standard for awarding emotional distress damages under federal civil rights statutes. Respondent offers no serious argument to the contrary.

Finally, Respondent's lengthy interpretation of the facts, which includes numerous assertions not supported by and contrary to the record, does not affect or diminish Petitioners' legal basis for seeking *certiorari* on punitive damages: the failure of the Ninth Circuit to undertake the required *de novo* review of evidence of discrimination by corporate actors other than Harry Lees, whom the jury concluded had not discriminated against Zhang, and its failure to apply *Campbell*'s standards to the amount of the punitive damages award. It is also of no consequence to Petitioners' challenge to the Ninth Circuit standard of proof for awarding compensatory damages for emotional distress.

I. The Ninth Circuit Failed to Apply *Campbell*, Warranting Summary Reversal or Certiorari.

A. Petitioners Did Not Waive Their Constitutional Challenge to the Punitive Damage Award.

Respondent argues that Petitioners waived their objection to the Ninth Circuit's failure to undertake *de novo* review of the punitive damages awarded in this case. (Respondent's Brief in Opposition ("Opp.") at 12.) This argument is without merit. Although Respondent does not discuss it, the Ninth Circuit expressly rejected Respondent's waiver argument and specifically held that it was required to review the punitive damage award *de novo*. *Zhang v. American Gem*, 339 F.3d 1020, 1042 (9th Cir. 2003) (citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001)) (App 42a).

Moreover, Petitioners raised this issue in their appellate briefs, as Respondent acknowledges in citing the relevant pages of Petitioners' briefs. (Opp. 13.) The Ninth Circuit also specifically requested that the parties be prepared at oral argument to discuss *Campbell*, which was decided only three days before oral argument and long after all briefing was complete. The constitutionality of the punitive damage award, as well as *Campbell*, were discussed extensively at oral argument.

Petitioners again raised the issue of the constitutionality of the punitive damage award, as well as the Ninth Circuit's failure to follow *Campbell*, in their petition for rehearing *en banc* before the Ninth Circuit. Respondent opposed the petition and argued in favor of the constitutionality of the award. The Ninth Circuit denied the petition. Respondent's

assertion that Petitioners have made these arguments "for the first time in this Court" (Opp. 15) is, thus, wholly lacking in support.

B. The Ninth Circuit's Failure to Apply *Campbell* Should Be Reviewed.

Respondent wrongly dismisses Petitioners' petition as merely a complaint regarding the application of *Campbell* to the facts. Petitioners' argument is not that *Campbell* was misapplied. It is that the Ninth Circuit failed to apply *Campbell* at all.

The Ninth Circuit failed even to mention the factors set forth in *Campbell* for evaluating the degree of reprehensibility of a defendant's conduct. 123 S. Ct. at 1521. The Ninth Circuit also ignored the new guidance *Campbell* provides regarding the ratio of punitive damages to compensatory damages, namely, that in cases with "substantial" compensatory damages, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limits of the due process guarantee." *Id.* The Ninth Circuit also ignored *Campbell's* admonition that a four to one ratio "might be close to the line of constitutional impropriety." *Id.* at 1524. The Ninth Circuit disregarded these instructions as well as *Campbell's* warning against punishing defendants more than once for the same conduct by awarding overlapping emotional distress and punitive damages. *Id.* at 1525. It also ignored *Campbell's* admonition that defendants not be punished for conduct unrelated to the basis for liability. *Id.* at 1523.

Because the Ninth Circuit failed to undertake a *de novo* review of the constitutionality of the punitive damage award, *certiorari* should be granted, either to summarily vacate and remand for consideration of *Campbell*, or to grant full review. If the Ninth Circuit's approach is allowed to stand, it will render *Campbell* a nullity.

II. The Conflict in the Circuit Courts Regarding Emotional Distress Damages Should be Resolved.

A. Petitioners Did Not Waive Their Challenge to the Circuit Split Regarding the Standard of Proof for Emotional Distress Damages.

Respondent's argument that Petitioners did not preserve the issue of emotional distress damages is unavailing. As Respondent concedes, this issue was raised in Petitioners' motion for a new trial. (Opp. 18-19.) The Ninth Circuit *sua sponte* requested additional briefing regarding the compensatory damage award before oral argument. It reviewed whether the compensatory damages awarded for emotional distress were excessive, and, applying its minority rule, concluded that Zhang's testimony was sufficient to support the emotional distress award. 339 F.3d at 1041 (App. 37a-39a). The Ninth Circuit did not rule that Petitioner's challenge to the legal standard was waived – even while holding that other issues were. 339 F.3d at 1039-40 (App. 20a).

While admitting that Petitioners preserved this issue in their new trial motion, Respondents argue that abuse of discretion review prevents this Court from addressing Petitioners' argument on the proper standard for emotional distress damages. (Opp. 18-19.) That is wrong. "A district

court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). Thus, review for abuse of discretion necessarily involves review of the law on which the district court based its decision, and Petitioners contend that the wrong law was applied.

Respondent also asserts that Petitioners' failure to object to the jury instruction constitutes a waiver. But that, too, is wrong. Petitioners' argument does not involve instructional error. Rather, it is a request that the proper legal standard, requiring demonstrable evidence of emotional distress, be applied here.

Furthermore, even if Respondents are correct, and Petitioners failed to preserve this issue in the district court, there is no dispute that Petitioners sought to have this issue reviewed by the *en banc* Ninth Circuit. Raising this issue on a sufficiency challenge or objection to a jury instruction in the district court would have been futile, as precedent in the Ninth Circuit was clear, if wrong. 339 F.3d at 1040 (App. 37a-38a). Petitioners raised this challenge in the most procedurally appropriate manner and pressed it strenuously before the *en banc* court, which is the only court that could overrule the earlier binding Ninth Circuit precedent. Imposing on litigants the burden of making empty gestures destined to fail is a waste of courts' and litigants' resources that this Court should not require.

B. The Conflict In the Circuit Courts Regarding the Standard of Proof for Emotional Distress Damages Should Be Reviewed.

The Ninth Circuit acknowledged that its rule regarding proof of emotional distress sufficient to support a compensatory damage award is substantially less stringent than the rule applied in the Fourth Circuit. *Zhang*, 339 F.3d at 1040 (App. 37a-38a). Unlike the Fourth Circuit, the Ninth Circuit does not require that evidence of emotional distress be "'demonstrable, genuine, and adequately explained.'" *Id.* (*quoting Price v. City of Charlotte*, 93 F.3d 1241, 1251 (4th Cir. 1996)). As Respondent concedes, the Fourth Circuit requires "objective evidence" to support a claim for emotional distress damages. (Opp. 21.) The Ninth Circuit does not. 339 F.3d at 1040 (App. 37a-38a).

In arguing the conflict "is more semantic than real," Respondent misapprehends the difference between substantiated testimony regarding a plaintiff's emotional distress and testimony that is simply conclusory. (Opp. 19.) While the plaintiff's testimony alone may sometimes be sufficient to support a finding of emotional distress, the majority of circuits require that the injured party "reasonably and sufficiently explain the circumstances of the injury and not resort to mere conclusory statements." *Price*, 93 F.3d at 1251; *Patrolmen's Benevolent Ass'n of the City of N.Y. v. N.Y.*, 310 F.3d 43, 162 (2d Cir. 2002) ("A plaintiff's subjective testimony, standing alone, is generally insufficient to sustain an award of emotional distress damages.").

Dennis v. Columbia Colleton Medical Center, Inc., 290 F.3d 639, 653 (4th Cir. 2002), is illustrative. In *Dennis*, the Fourth Circuit ruled that the plaintiff's conclusory statements that she was "devastated" and "humiliated" by the discrimination were not sufficient to support emotional distress damages. The statements in *Dennis* resemble closely the testimony given by Respondent in the district court.

Review in this case would remedy a deepening circuit split in which the Ninth and Eleventh Circuits stand alone in allowing the barest of evidence to support substantial emotional distress awards. This issue is of heightened importance in light of *Campbell*, which recognizes that emotional distress damages awarded for hurt and humiliation present risks of duplicative and unconstitutional punishment. 123 S. Ct. at 1525. It follows that an impermissible emotional distress award may often yield an unconstitutional punitive damages award under *Campbell*'s framework. If compensatory damages are inflated by an impermissible emotional distress award, a punitive damages award may be unconstitutionally high – even though the ratio might not cause a court to "raise a suspicious judicial eyebrow." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 583 (1996).

CONCLUSION

For all these reasons and the rea asons set forth in the petition for a writ of *certiorari*, Petiti ioners request that the Court grant *certiorari*.

Res spectfully submitted,

JANET HUGIE SMITH
FREDERICK R. THALER
RAY QUINNEY & NEBEKER
36 South State Street
Suite 1400
Salt Lake City, UT 84111
(801) 532-1500

WIL LIAM A. NORRIS
REX S. HEINKE*
JON ATHAN GOTTLIEB
AKI N GUMP STRAUSS
HAU UER & FELD LLP
202 9 Century Park East
Suit te 2400
Los Angeles, CA 90067
(31 0) 229-1000

* *Counsel of Record*

Attorneys for Petitio ners